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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1974

No. 74-1112

In the Matter of
ATLANTA INTERNATIONAL RACEWAY, INC.,
Bankrupt.

JAMES H. PRICE,
Petitioner,

vs.

STACEY W. COTTON, Trustee,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 6, 1974.

I. OPINIONS BELOW

(a) The Judgment of the Court of Appeals for the Fifth Circuit R. 105 affirming per curiam the judgment of the District Court for the Northern District of Georgia is reported at 505 F.2d 733.

(b) The Judgment of the District Court for the Northern District of Georgia, Atlanta Division, [R. 96] adopting the Report of Bankruptcy Judge and Special Master is not reported, but a copy is appended to this petition in the Appendix at p. A-3.

(c) The Report of the Bankruptcy Judge and Special Master [R. 62], which was adopted as part of the Judgment of the District Court, is unreported, but a copy is appended to this petition in the Appendix at p. A-11.

II. JURISDICTION

(a) The Judgment of the Court of Appeals for the Fifth Circuit was made and entered on December 6, 1974, and a copy thereof is appended to this petition in the Appendix at page A-5.

(b) No order has been entered respecting a rehearing or an extension of time within which to petition for certiorari.

(c) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

III. QUESTION PRESENTED FOR REVIEW

The only question presented is:

Can a plan of reorganization be imposed on a debtor corporation in proceedings under Chapter X of the Bankruptcy Act, 11 U.S.C. 501-676, when the corporation is solvent and the plan has been rejected by the stockholders of the only class of stock of the corporation?

IV. STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

Chapter X of the Bankruptcy Act, Sections 101-276, United States Code, Title 11, Chapter 10, Sections 501-676, is appended to this petition in the Appendix at p. A-45.

V. STATEMENT OF THE CASE

Atlanta International Raceway, Inc., Bankrupt, is the Debtor in reorganization proceedings pending in the United States District Court for the Northern District of Georgia. [R. 1] The Debtor has been found solvent [R. 53, 54] and its stockholders decreed to have an equity in the corporation of approximately $320,000.00 [R. 48, 54].

The Debtor has issued only one class of stock and has 320,254 shares outstanding [R. 7] which are held by 1,300 individual shareholders. [R. 42] Petitioner is the holder of record of more than 60,000 shares of the Debtor's stock.

A plan of reorganization proposed by the Trustee was submitted to the stockholders for approval, and was overwhelmingly rejected by them, both in numbers of shares and numbers of holders. [R. 59] The proposed plan was approved, confirmed and adopted by the District Court after the proponents of the Plan of Reorganization offered to purchase the shares of any objecting shareholders for $1.60 per share. [R. 87-93, 103] The plan has never been accepted by the shareholders.

Federal jurisdiction of this matter in the District Court in the first instance was based on 28 U.S.C. 1334.

VI. REASONS FOR GRANTING THE WRIT

(a) The decision of the Courts below decide an important question of federal law which has not been decided heretofore in any reported decision of any court. As such, the decisions below establish the only precedent for the administration of an important provision of the Bankruptcy Act which affects stockholders of distressed corporations throughout the country. The present economic conditions in the United States have resulted in unprecedented resort to bankruptcy proceedings under the Federal bankruptcy laws by small corporations. The rights of stockholders of such corporations which are solvent are determined in this case. The personal investments and fortunes of many such stockholders will be decided here as will be the future ownership and control of a substantial part of the country's economy as represented by such presently distressed companies. Petitioner respectfully submits that the far reaching and substantial effects of such decision should be reviewed by this Court.

(b) In addition to its novelty, the question presented is of significant and substantial importance in the administration of the Federal Bankruptcy laws. Section 179 of the Bankruptcy Act, 11 U.S.C. 579, provides that the Judge shall set a hearing to consider confirmation of a proposed plan of reorganization . . .

> "After a plan has been accepted in writing, filed in Court, by or on behalf of creditors holding two-thirds in amount of claims filed and allowed of each class, and, if the debtor has not been found to be insolvent, by or on behalf of stockholders holding the majority of stock, of which proofs have been filed and allowed, of each class, exclusive of creditors or stockholders or of any class of them . . . for whom payment or protection has been provided as prescribed in paragraphs (7) and (8) of section 216 of this Act, . . ."

Section 216 of the Act, 11 U.S.C. 616, provides, in pertinent part:

"A plan of reorganization under this chapter— . . .

"(7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection . . .

"(8) shall provide for any class of stockholders which is affected by the plan and does not accept the plan by the majority of the stock required under this chapter, adequate protection . . ."

The decisions below hold that the votes of shareholders of solvent corporations may be disregarded in confirming and imposing a plan of reorganization in Chapter X proceedings if an "adequate" sum is offered to purchase their shares of stock. Because of identical provisions in the Bankruptcy Act regarding creditors, the decisions below will allow the votes of creditors to be disregarded in the same manner as the votes of stockholders, thus dispensing with any requirements for acceptance, and rendering voting procedures for stockholders and creditors superfluous. Inasmuch as no prior decision has ever authorized such a procedure in the Administration of the Federal bankruptcy laws, this case will have substantial impact and far-reaching effect in such administration.

(c) The decisions of the Courts below are erroneous because of their direct contradiction to the Congressional mandate and objectives set forth in the Bankruptcy Act. Section 236 of the Act, 11 U.S.C. 636, provides in part:

". . .[I]f no plan . . . is accepted within the time fixed . . . the judge *shall*—

* * *

"(2) . . . enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with

> pursuant to the provisions of this title, or dismissing the proceeding under this chapter; . . ." [Emphasis added.]

The mandate of Congress to a District Judge in proceedings under Chapter X where "no plan is *accepted*" is thus clear—the Judge "*shall*" enter an order which either adjudges the corporation a bankrupt or dismisses proceedings. The statute allows no other choices. There has been no acceptance in this case, and the decisions of the District Court and Court of Appeals are directly violative of that statutory requirement.

Congress recognized the differing positions of creditors and stockholders in solvent and in insolvent corporations by giving only to creditors a voice in Chapter X proceedings when the corporation is not solvent, and participation to both creditors and stockholders—in virtually identical language—when the corporation is solvent. The wisdom of the statutory scheme is obvious. Where the claims of creditors equal or exceed the corporation's assets, the creditors are given the only voice in determining whether the corporation will be reorganized under a plan acceptable to them or whether it will be liquidated, §179. Where the corporaton's assets exceed the claims of creditors, creditors will not suffer from a liquidation; yet a plan of reorganization could be detrimental to them. For that reason, their acceptance is required even when the corporation is solvent. Similarly, where shareholders have an equity interest in the corporation, a plan of reorganization could be detrimental to them. For that reason, their acceptance is also required, §179. If the shareholders reject a proposed plan, the creditors are not injured because the assets of the corporation exceed their claims.

Congress obviously did not intend to impose a plan of reorganization on creditors without their consent. It therefore established a voting procedure to ascertain the existence of such consent, or the lack thereof, §179, and ordered the judge to proceed with liquidation in bankruptcy or to dismiss the proceedings if there was no such consent, §236. The statutory

scheme further recognized the possibility that different classes of creditors may disagree, some approving a proposed plan and others rejecting it, and provided for such situation by permitting the Court to properly provide for "any class of creditors" not accepting the plan, §216(7). Without this provision the Court would be in a quandary to declare a proposed plan accepted or rejected where one class of creditors accepted the plan and another class rejected it. No such difficulty exists where there is only one class of creditors—they either accept or reject the plan. If they accept the plan, the Court should apply the provisions of Section 179. If they reject the plan, the Court should apply the provisions of Section 236.

The Congressional objective regarding stockholders is expressed in identical language with exact parallels to procedures for creditors in Sections 179 and 216. The clear intent was to give stockholders the *right* to reject a plan of reorganization when they have an equity interest in the corporation. The decisions below deny that right, and produce a strained and bizarre construction of Sections 216(7) and (8), 11 U.S.C. 616(7) and 616(8), and are not in harmony with the rest of Chapter X of the Bankruptcy Act. They also are contrary to the express provisions of Section 236 of the Act, 11 U.S.C. 636; make meaningless and superfluous the provisions of the statute pertaining to voting, computing votes, percentages of votes required to constitute acceptance, notices of voting, and eligibility to vote; and strain and warp the overall intent of Chapter X into something it was never designed to accomplish—*force* a plan on unwilling creditors and stockholders.

The only case we have found involving a similar construction problem is *In Re Granville & W. Bldg. Corp.*, 87 F.2d 101 (7th Cir. 1936). In construing a prior similar provision concerning creditors, the Court of Appeals there stated:

> ". . . [A]ppellees in support of the order rely upon a proviso (e) (1) (c) in that section which states that such

acceptance shall not be requisite to the confirmation of the plan if provision is therein made for the protection of the interests, claims, or liens of such nonaccepting creditors, or class of creditors in the manner provided in subdivision (b), clause (5) of Sec. 77B.

"The only provision of that clause which is here applicable is the last one under which the court impliedly, if not explicitly, found that the plan approved was consistent with the circumstances presented, and equitably and fairly provided adequate protection to appellants for the realization by them of the value of their interests . . .

"A reading of this provision separate and part from the other portions of the section, would seem to indicate that Congress had invested the District Court with power to approve any nonaccepted plan if under the circumstances presented, it was of the opinion that the plan equitably and fairly provided adequate protection for the claims of interested creditors. This provision, however, must be construed together with all the other provisions of the section and the act, and when so done it is obvious that Congress had no such intention. Otherwise, there would have been no need for the enactment relating to acceptances and the other provisions relating to adequate protection of the nonaccepting creditors."

We respectfully submit that the reasoning of the Court in the foregoing case is equally applicable here. The construction placed on Chapter X by the Courts below in this case gives the District Court authority to approve *any* plan, without regard to acceptance by creditors or stockholders, when the Court is of the opinion that the claims of creditors and stockholders are otherwise adequately provided for. It is obvious Congress had no such intention. Otherwise, it would not have enacted provisions relating to acceptances, voting eligibility, and procedures in the event of nonacceptance.

IX. CONCLUSION

For the foregoing reasons Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted

T. J. LEWIS, JR.
Counsel for Petitioner

Certificate of Service

I hereby certify that I have this day served three copies of the within and foregoing Petition for Certiorari on each of the following persons in accordance with Rule 33(1) of the Supreme Court Rules by depositing copies thereof in the United States mail, Air Mail postage prepaid, to:

Stacey W. Cotton, Esq., Trustee
46 Fifth Street, N. E.
Atlanta, Georgia 30308

Paul Gonson, Esq.
Associate General Counsel
Securities and Exchange Commission
Washington, D. C. 20549

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

This 6th day of March, 1975.

T. J. Lewis, Jr.
Counsel for Petitioner

APPENDIX

In the United States Court of Appeals
for the Fifth Circuit

No. 74-1974

the matter of:

Atlanta International Raceway, Inc.,
Bankrupt

James H. Price,
Appellant,

vs.

Stacey W. Cotton, Trustee,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(December 6, 1974)

efore Morgan and Clark, Circuit Judges. Gordon, District Judge.

er Curiam: Affirmed. See Local Rule 21.[1]

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[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, Cir., 1970, 430 F.2d 966.

United States Court of Appeals
for the Fifth Circuit

October Term, 1974

No. 74-1974

D. C. Docket No. BK 70556

In the Matter of:

Atlanta International Raceway, Inc.,
Bankrupt,

James H. Price,
Appellant,

vs.

Stacey W. Cotton, Trustee,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Before Morgan and Clark, Circuit Judges and Gordon, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellant pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

December 6, 1974

Issued as Mandate: Dec. 30, 1974.

A true copy

Test: EDWARD W. WADSWORTH
Clerk
U. S. Court of Appeals
Fifth Circuit
By CONNIE NELSON
Deputy
New Orleans, Louisiana

United States District Court
Northern District of Georgia
Atlanta Division

In Proceedings for the Reorganization of a Corporation

In the Matter of:
Atlanta International Raceway, Inc.,
Debtor. } Case No. 70556

ORDER CONFIRMING TRUSTEE'S PLAN FOR REORGANIZATION, AS AMENDED

I

INTRODUCTION

On January 18, 1971, Atlanta International Raceway, Inc. (hereinafter called "Debtor") filed a voluntary petition for re-

organization under Chapter X of the Bankruptcy Act. After two years and eleven months, this proceeding has reached the stage that a viable Plan for Reorganization of Debtor has been presented to the Court for confirmation. The Honorable W. H. Drake, Bankruptcy Judge and Special Master, on November 27, 1973, filed his Report with detailed findings, conclusions and recommendations for confirmation of the Trustee's Plan, as amended. This Plan, as amended, was proposed by the Trustee, Stacey W. Cotton (hereinafter called the "Trustee's Plan"), based upon proposals submitted to him by James G. Baker, Walter E. Nix and L. G. DeWitt (hereinafter called "Baker/Nix/DeWitt").

Only one objection has been made to the Special Master's Report. This objection was made by Mrs. Paul Jones, Paul Jones and James H. Price, stockholders of Atlanta International Raceway, Inc., Debtor. The Court granted a hearing to the Objectors for Thursday, December 13, 1973, at 10:00 o'clock A.M., but the same was waived by counsel for Objectors, with the consent of the Trustee, since the objection is based upon a legal issue not involving any factual or evidentiary dispute. For the reasons set forth hereinafter, the objection of Mrs. Paul Jones, Paul Jones and James H. Price is hereby overruled and denied.

The Report of W. H. Drake, Bankruptcy Judge and Special Master, in its entirety is hereby approved, confirmed, and adopted and made the Order of this Court, and in furtherance thereof the Court makes additional findings as follows:

II

COMPLIANCE WITH SECTION 221

Hearings on confirmation were held before Judge Drake on October 4, and November 7, 1973. Judge Drake, in his Report, has made detailed findings, conclusions and recommendations

on all matters which were raised before him. His Report is hereby adopted and made the Order of this Court. The only matters remaining for determination are (1) the one objection noted, and (2) whether or not the Trustee's Plan meets the requirements of Section 221 of the Bankruptcy Act and should be confirmed.

(a) **Payment of Taxes [Section 221(1)]**

The first requirement of Section 221(1) is that, pursuant to Section 199 of the Bankruptcy Act, all claims of the United States for taxes must be paid in full. The Trustee's Plan, in Article Four, subparagraph (a), provides that all taxes shall be paid in cash in full within ninety days of confirmation, thus complying with Section 221(1) of the Act.

(b) **Compliance With Chapter X [Section 221(1)]**

In addition, Section 221(1) requires that the Plan comply with Article VII, Section 199 and Article X of Chapter X. By Order of July 11, 1973, the Court previously found, as required by Section 174 of the Bankruptcy Act, that the Trustee's Plan complies with the provisions of Chapter X, and the Court hereby reaffirms its previous Order.

(c) **Fair and Equitable and Feasible** [Section 221(2)]

Under Section 221(2), a Plan can be confirmed only if the Plan is found to be "fair and equitable, and feasible." The Court, by Order of July 11, 1973, has previously found, pursuant to Section 174, that the Trustee's Plan is "fair and equitable, and feasible." No evidence has been presented since that time to show that the Court's previous finding is incorrect, and the same is hereby reaffirmed.

(d) **Proposal and Acceptance in Good Faith** [Section 221(3)]

Under Section 221(3), the Judge must determine that "the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Title." As set forth in his Report of November 27, 1973, pages 18-23, Judge Drake caused an inquiry to be made into charges of impropriety, bad faith and self-dealing. From the evidence adduced, including the depositions which were examined *in camera* by the Court, and the evidence presented during the hearings on confirmation, Judge Drake concluded that the allegations of impropriety, lack of good faith and self-dealing were not supported by the evidence. He further concluded that the Plan, and the conduct of the parties in connection therewith, complied with the provisions of Chapter X of the Act. No objections have been filed to Judge Drake's findings and conclusions. This Court is satisfied from the evidence and the record in this proceeding that the proposal of the Trustee's Plan and its acceptance are in good faith and no acceptances have been made or procured by means or promises forbidden by the Act.

(e) **Costs and Expenses of Administration** [Section 221(4)]

All payments to be made or promised by the Debtor, as reorganized, for services and for costs and expenses in, or in connection with, the proceeding or the Trustee's Plan and incident to the reorganization, will be fixed after confirmation of the Plan, and will be subject to the approval of the Court, except insofar as they may have already been approved by previous Order of the Court and to the extent that the same have been approved, those Orders are hereby reaffirmed by this Court.

(f) **Officers and Directors** [Section 221(5)]

The final requirement for confirmation is the requirement in Section 221(5) that the identity, qualifications and affiliations of the persons who are to be directors or officers, or voting trustees, upon the consummation of the Plan, have been fully disclosed and that their appointment to such offices or continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy. This provision was designed to insure that management would be faithful to its trust and able to perform its duties so that the reorganized company may operate as a successful, economic unit. Under Article Twelve of the Trustee's Plan, the Court shall select and appoint the directors upon the recommendation of the Trustee, or in such other manner as the Court shall direct.

Article Twelve of the Trustee's Plan further provides that the selection of officers for Debtor shall be made by the Directors appointed by the Court. By this Order, the Court hereby requires that the selection of officers be made subject to the approval of the Court. Any director or officer selected pursuant to Article Twelve of the Trustee's Plan shall not be qualified or authorized to act as a director or officer for Debtor until their selection by the Court. Therefore, the selection and appointment of the directors and officers of Debtor shall be disclosed to and approved by the Court as required by Section 221(5) of the Act.

III

NECESSITY FOR PROMPT ACTION

After nearly three years, it appears that there is a high probability that this matter can be speedily concluded. The experiences of the last three years have required considerable effort by the Trustee and his counsel and the Court. However, as

noted by Judge Drake in his Report, "further delay in light of the present energy crisis and its implications for the future of automobile racing could be quite detrimental to the creditors and shareholders of this Debtor." The Court is satisfied that, when viewed with a strong sense of reality, the creditors and shareholders will recognize that endless protracted delays may mean that neither their interest nor the public's interest will be benefited.

IV

OBJECTION TO CONFIRMATION

Only one objection was made to Judge Drake's Report by Mrs. Paul Jones, Paul Jones and James H. Price, stockholders. As noted hereinbefore, the Court granted Objectors a hearing on their objection for Thursday, December 13, 1973. The Objectors' counsel, with the consent of the Trustee, waived formal hearing and agreed their objection was a legal issue which could be submitted by briefs. Objectors filed a brief with their objection and the Trustee has filed a responsive memorandum brief.

The Objectors contend § 216(8) of the Act does not apply to a corporation which has only *one* class of stockholders. The Court does not agree. Clearly, Debtor is a corporation which is entitled to relief under the provisions of Chapter X. This, in the Court's opinion, would include the provisions of § 216(8). The Court feels that if Congress had intended that the provisions of § 216(8) would not apply to corporations with only *one* class of shareholders, it would have so provided. Since there is no such provision, the Court is satisfied the framers of the Act intended that § 216(8) would apply to all corporations eligible for relief under Chapter X of the Act.

As Judge Drake has correctly concluded, the framers of the Act anticipated possible disputes over the meaning of words

in the singular or plural form. They very wisely provided in § 1(34) and (35) that "words importing the plural number may be applied to and mean only a single person or thing" and vice versa. These definitions were made applicable to Chapter X pursuant to § 102 of the Act since they are not inconsistent or in conflict with the provisions of Chapter X. Judge Drake is affirmed. The objections are overruled and denied.

Now, Therefore, it is Ordered, Adjudged and Decreed:

1. The Trustee's Plan of Reorganization, as amended, is hereby confirmed.

2. The provisions of the Trustee's Plan shall be binding upon the Debtor, as reorganized, upon Baker/Nix/DeWitt, and upon all creditors and shareholders, whether or not they are affected by the Plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable.

3. Subject to the further directions of this Court, the Debtor, the Trustee and Baker/Nix/DeWitt are directed to comply with the provisions of the Plan and with all Orders of the Court relative thereto, and shall take all action necessary and required to carry out and consummate the Plan pursuant to the applicable State and Federal laws and the further Orders of this Court.

4. All creditors and shareholders of the Debtor, the persons participating in these proceedings, and all other persons are hereby permanently enjoined and restrained from doing any act or taking any action interfering with these proceedings or with the enforcement or carrying out or consummation of the terms of and provisions of the Plan, or with the Orders of this Court relative thereto.

5. The property dealt with by the Plan shall be transferred by the Trustee to the Debtor, as reorganized, free and clear of

all claims and interests of the Debtor, creditors and stockholders, whether or not such claims are provable under Section 63 of the Bankruptcy Act, 11 U.S.C. § 103, and whether secured or unsecured, liquidated or unliquidated, fixed or contingent, except such claims and interests as are otherwise expressly provided for in the Plan or in this Order.

6. The Trustee or the Debtor, as reorganized, may file objections to any claim or claims, at any time subsequent to confirmation of the Plan and until further order of this Court.

7. The Trustee and the Debtor, as reorganized, are hereby authorized to issue all stock required pursuant to the Trustee's Plan.

8. The Trustee shall retain, subject to further orders of the Court, all funds heretofore deposited in his Trustee's bank accounts, or invested by him, from which funds the Trustee shall make all payments which, by the provisions of the Plan, are required to be made.

9. The distribution of funds shall be made by the Trustee pursuant to the Plan and in accordance with the provisions of § 224(4) of the Bankruptcy Act; provided, however, that pursuant to the provisions of paragraph 6 of this Order authorizing the filing of objections to claims beyond the date of confirmation of the Plan, and pursuant to Article Six, sub-paragraph (f) of the Trustee's Plan, the Trustee or the Debtor, as reorganized, shall defer distribution to creditors or stockholders whose claims are filed, contingent, unliquidated or disputed until such time as objections to such claims are prepared, filed and the allowance or disallowance of such claims shall be adjudicated by this Court and until all appellate remedies have been exhausted or the time therefor has run.

10. The Court expressly reserves jurisdiction to make such orders in aid of consummation of the Trustee's Plan as it shall deem proper.

11. The provisions recommended by Judge Drake for the "adequate protection" of shareholders are hereby adopted and made the Order of the Court; said provisions are binding upon the Debtor, as reorganized, and Baker/Nix/DeWitt; and the Trustee, the Debtor, as reorganized, and Baker/Nix/DeWitt are directed to take all action necessary and required to implement said provisions. Specific procedures for the implementation of said provisions shall be prescribed at the appropriate time by subsequent Court Orders.

It Is So Ordered.

Dated at Atlanta, Georgia, this 27th day of December, 1973.

/s/ JUDGE SIDNEY O. SMITH, JR.
United States District Judge

United States District Court
Northern District of Georgia
Atlanta Division

In Proceedings for the Reorganization of a Corporation

In the Matter of:
Atlanta International Raceway, Inc.,
Debtor. } Case No. 70,556.

REPORT OF BANKRUPTCY JUDGE AND SPECIAL MASTER ON CONFIRMATION OF PLAN, ADEQUATE PROTECTION, OBJECTIONS TO PLAN AND OTHER MATTERS

To: The Honorable Sidney O. Smith, Jr., Chief United States District Judge

The undersigned Bankruptcy Judge and Special Master appointed herein by previous Order of this Court respectfully reports to the Court as follows:

I

Introduction

The purpose of this Report is to consider and rule upon numerous matters which have been presented to the undersigned since the Trustee's Plan of Reorganization (As Amended) was initially submitted to the creditors, shareholders and interested parties of Debtor in late July, 1973. It may be helpful, however, to recount briefly the history of this proceeding in order to place the matters now before this Court in proper context.

II

History of Proceeding

Pursuant to Orders of this Court, the last day for filing of proposed plans for reorganization was set for February 5, 1973. On that date, Stacey W. Cotton, Trustee for Debtor, filed two proposed plans for the reorganization of Debtor based upon proposals submitted to him by James G. Baker and Walter E. Nix (hereinafter called "Baker/Nix") and a proposal submitted to him by James H. Price (hereinafter "Price"). No other proposals were filed or submitted within the time initially set by the Court. Thereafter, proceedings were had before the Court which resulted in the Order of this Court of April 4, 1973, dismissing the plan, based upon the Price proposal. This Order was entered at the request of counsel for Price and with their consent.

On May 2, 1973, Trustee filed his First Amended Plan for Reorganization of Debtor based upon an amended proposal of Baker/Nix. This amended proposal was further amended by Baker/Nix and Trustee filed a Second Amended Plan of Reorganization in open court on May 30, 1973. It is the Second Amended Plan of Reorganization which was before this Court

for hearing and consideration on May 30, 1973, and which is the subject matter of a "Report of Bankruptcy Judge and Special Master on Solvency, Classification of Creditors and Stockholders, and Approval of Plan of Reorganization" (hereinafter "Report"), filed with the Clerk of this Court on June 18, 1973, which Report was adopted and affirmed by Order entered on July 11, 1973. This is the same Plan [known as Trustee's Plan of Reorganization (As Amended)] which was initially submitted to the shareholders, creditors and interested parties for their consideration and vote in late July, 1973.

At the hearing on May 30, 1973, Trustee advised this Court that Loyd Smith and T. Jack Black (officers of Debtor prior to the filing of this proceeding on January 8, 1971) [hereinafter called "Smith/Black"] had submitted a proposal for a plan to him on the afternoon of May 29, 1973, less than twenty-four (24) hours before the hearing. The Court was further advised during the course of the hearing that Mr. Charles O. Baird, Jr., counsel for American Diversified Industries of New York City, was interested in making, on behalf of his client, a proposal for a plan. He advised that his client, if given an opportunity, would submit a proposal to pay $1,800,000.00 to purchase the assets of the estate, with the Trustee to retain any cash on hand. This Court, although the time for filing proposals or plans had long since expired, in an effort to obtain the best proposal available for the benefit of this Debtor, its creditors and stockholders, allowed Smith/Black and Mr. Baird's client until June 4, 1973, to file with the Trustee formal proposals for a plan.

On June 4, 1973, neither Mr. Baird nor his client filed a proposal or plan with this Court and none has been filed by them to date.

On June 4, 1973, Smith/Black did file an amended proposal. This Court considered and ruled upon that amended proposal in its Report of June 18, 1973. This Court found the amended

proposal insufficient in several respects, made detailed findings relating thereto and disapproved the proposal (see pages 7 and 8 of the June 18, 1973, Report).

Accordingly, as of June 18, 1973, the only plan before the Court was the Trustee's Plan of Reorganization (As Amended). The Court found the Plan to be fair, equitable and feasible and ordered the Trustee to submit same to the shareholders, creditors and interested parties of this Debtor for their consideration and vote (see Report of June 18, 1973, and Orders of July 11, 16 and 17).

In addition, at the hearing on May 30, 1973, this Court received evidence on the issue of solvency and valuation of Debtor, both from the standpoint of assets and as a going business concern. This evidence is set forth at pages 3 through 5 of the Report of June 18, 1973; pages 6 through 23 of Transcript of Proceedings of May 30, 1973; and Exhibits T-1, T-2, T-3 and T-4 to said Transcript. Accordingly, the Court found that the approximate value of Debtor's stock was $1.00 per share (see page 11 of the Report of June 18, 1973, and Order of July 11, 1973).

As heretofore stated, the Plan was submitted for vote in late July, 1973. By Order of this Court, voting closed at the conclusion of business on August 22, 1973, and a hearing was set before this Court for August 23, 1973 (see Order of July 16, 1973).

On August 14, 1973, a third amendment to the Trustee's Plan of Reorganization (As Amended) was submitted to this Court and an Order was entered allowing same and directing Trustee to submit the amendment to all shareholders, creditors and interested parties of Debtor (see Orders entered on August 14, 1973). The Court specifically found that the amendment did not materially and adversely affect the interests of creditors or shareholders of Debtor and, accordingly, no hearing was re-

quired. In substance, the Plan was amended as follows: (1) to add to Messrs. Baker and Nix, Mr. L. G. DeWitt, a man of substantial experience in the stock car racing industry; (2) to provide, upon confirmation, for additional loans to Debtor or Trustee in the sum of $175,000.00 to fund the Plan and for other specified purposes; and (3) to provide that an additional $150,000.00 would be loaned to Debtor within ninety (90) days rather than eighteen (18) months after the Order of Confirmation of the Plan is final.

Voting having closed on August 22, 1973, a tentative report of the results was made by the Trustee to this Court at its hearing on August 23. That report revealed an overwhelming acceptance of the Plan by all classes of creditors (Secured, Junior Lienholders, Unsecured) and an overwhelming rejection of the Plan by Shareholders.

A final written report of the voting results was filed with the Court by Trustee on August 30, 1973, notice of which was sent to all creditors, shareholders and interested parties of Debtor.

It was suggested at the August 23rd hearing that an opportunity be provided for the filing of such proposals as might provide adequate protection for the dissenting shareholder class pursuant to the provisions of Sections 179 and 216(8) of the Bankruptcy Act. It was also suggested that the opportunity for filing additional proposals for plans of reorganization for consideration by the Court be allowed, notwithstanding the fact that numerous deadlines and extensions had already been set by this Court for the filing of plans and proposals therefor since February 5, 1973.

Accordingly, an Order was entered by the Court, based upon a Consolidated Application submitted by Trustee, which provided, in part, as follows: (1) that Baker/Nix/DeWitt have through and including September 24, 1973, within which to file (by and through Trustee) with this Court any proposal for adequate protection of the dissenting shareholder class; (2) that any

objections to confirmation of the Trustee's Plan of Reorganization, as thrice amended, or the vote thereon must be filed with the Court in writing on or before September 24, 1973; (3) that any objections to proposals for adequate protection of the dissenting shareholder class must be filed in writing with the Court on or before October 1, 1973; and (4) that any additional proposals for plans must be filed on or before September 24, 1973, and "must be accompanied by a deposit of $100,000.00 in a form acceptable to and approved by the Honorable W. Homer Drake, Bankruptcy Judge, and the Trustee of Debtor."

III

Filings With the Court and Other Matters Since Order of August 30, 1973.

On September 24, 1973, Baker/Nix/DeWitt, by and through Trustee, filed an "Application in Aid of Confirmation Invoking Section 216(8) of the Bankruptcy Act," an "Objection to Allowance of Claim No. 100 of T. Jack Black," an "Objection to Allowance of Claim No. 101 of T. Jack Black," and an "Objection to Allowance of Claim No. 103 of Lamar W. Sizemore."

On the afternoon of Setpember 24, 1973, with a "conditional allowance" by this Court, a "Plan of Reorganization Sponsored by the Debtor, a Majority of Its Directors and Mr. James H. Price" (hereinafter "Stockholders' Plan"), was filed with the Court. This Plan was submitted by Messrs. T. Jack Black (President of Debtor on January 18, 1971), Loyd Smith, Paul Jones and Mrs. Paul Jones (all being stockholders of Debtor and members of its Board of Directors) [hereinafter "Atlanta Group"] and Mr. James H. Price (an alleged stockholder of Debtor).

The "conditional allowance" with respect to filing of the plan is based upon the following facts and sequence of events. On the

afternoon of September 17, 1973, Mr. Ralph G. McCallum, Jr. of the law firm of Heyman and Sizemore, as counsel of record for the "Atlanta Group," and Mr. R. Neal Batson, as Attorney for Trustee, met with this Court to discuss the form and nature of the deposit for the stockholders' Plan which was then being contemplated by the "Atlanta Group" and Mr. Price. This meeting was held at the request of Mr. McCallum and in accordance with the requirement of this Court's Order dated August 30, 1973, which provided, in pertinent part, as follows:

> "Any and all plans for reorganization, in order to be considered, must be filed with this Court on or before September 24, 1973, and must be accompanied by a deposit of $100,000.00 *in a form acceptable to and approved by the Honorable W. Homer Drake, Bankruptcy Judge, and the Trustee of Debtor.*" (Emphasis supplied.)

Mr. McCallum requested that this Court approve as deposit for the Stockholders' Plan, an assignable Certificate of Deposit from the First National Bank of Atlanta in the amount of $100,000. Mr. McCallum advised the Court that such a deposit would be acceptable to all sponsors of the Stockholders' Plan, Mr. Batson advised that same was acceptable to the Trustee and this Court granted its approval.

Nothing further was heard from the sponsors or their counsel, by this Court, its Trustee or Attorney for Trustee, until the afternoon of September 24, 1973, when the Stockholders' Plan was submitted to this Court for filing. Notwithstanding a recital in the Plan to the effect that it was accompanied by the approved Certificate of Deposit (see Article Eighteen of the Stockholders' Plan entitled "Security for the Plan," at pages 13 and 14 thereof), no such deposit accompanied the Plan.

On the contrary, the sponsors of the Plan requested the Court to accept the following deposit: $75,000.00 in the form of a Trust Company Bank Federal Reserve Check, with the sponsors

of the Plan to deposit an additional $25,000.00 with the Trustee by the close of business on the following day (September 25, 1973).

This Court agreed to the conditional filing with partial deposit, subject to subsequent ruling by the Court as to timeliness and adequacy, and instructed counsel for Price to serve a copy of the Plan and tender the partial deposit to Trustee on the afternoon of September 24, 1973.

In addition, the Stockholders' Plan introduced a new condition with respect to the deposit (see Stockholders' Plan, Article Eighteen, entitled "Security for the Plan," at pages 13 and 14 thereof) which was unknown to and not approved by either the Court or Trustee. It provided, in pertinent part, as follows:

> "To secure the undertakings of this Plan . . . the proponents have tendered . . . deposit . . . with the understanding . . . that if any default should occur by any party which jeopardizes the undertakings of the Plan, then that part of the deposit belonging to any of the other proponents shall not be subject to any penalty."

Notwithstanding the foregoing, a copy of the Stockholders' Plan, the $75,000.00 check and 40,000 shares of Equity National Industries, Inc. stock was delivered to the Trustee on the afternoon of September 25, 1973. On the afternoon of September 26, 1973, the 40,000 shares of stock was replaced with three Federal Reserve checks totalling $25,000.00, one of which was postdated, all conditionally allowed subject to subsequent ruling by the Court on the question of timeliness and adequacy.

On the afternoon of September 26, 1973, Mr. McCallum requested a conference with this Court regarding certain matters. A conference was held. The Trustee, his attorney, counsel for Mr. Price, and Mr. McCallum were present. Mr. Mc-

Callum advised the Court, in the presence of the above designated individuals, that he had reason to suspect that certain votes in favor of the Baker/Nix/DeWitt Plan may have been solicited in violation of Section 203 of the Bankruptcy Act and that any such action should be inquired into by the Court, and, if warranted, appropriate action should be taken by the Court to disqualify the votes and/or the Plan. The Court, Trustee and his Attorney agreed. It was further suggested by Mr. McCallum, during the course of the meeting, that the investigation be made in such a manner as not to encourage further discord among the shareholders of Debtor which could eventually result in the impossibility of getting any plan approved. Accordingly, it was suggested and agreed by all present that the Court direct the Attorney for Trustee to take the depositions of 13 individuals to determine what, if any, evidence existed as to any improper solicitation of votes by anyone with respect to the Baker/Nix/DeWitt Plan which may have been in violation of the Bankruptcy Act. In accordance with this suggestion, it was agreed upon by all parties present that Attorney for Trustee would commence depositions on the following day at 5:00 P.M. at his offices, with Mr. McCallum, Price counsel, Baker/Nix/DeWitt counsel, First National Bank of Atlanta counsel and Trustee present, for the purpose of inquiring into any such acts. It was further agreed prior to the depositions that all questions during the course of these depositions would be propounded by the Attorney for Trustee and that all counsel present would have an opportunity to present to Trustee's Attorney any questions which they desired propounded. Further, that an original only would be made by the court reporter and the originals of the depositions would be forwarded directly to the Court for an *in camera* examination.

Accordingly, the depositions of the following individuals were taken beginning at 5:00 P.M. on September 27, 1973: Stacey Cotton, Richard Howard, T. Jack Black, Andrew Higgins, Paul Jones, William Whittle, Loyd Smith, David Kell, Ralph Mc-

Callum, Carey Wickland, Jim Baker, Walter Nix and L. G. DeWitt.

The transcript of these depositions, approximately 500 pages in length and covering approximately 12 hours of examination, have been filed with the Court and carefully examined.

On October 1, 1973, Mr. McCallum, acting on behalf of Debtor and its stockholders, filed "Objections to Confirmation of Baker-Nix Plan and to Baker-Nix Proposal for Dealing with Stockholders." The portion of said Objections dealing with objections to confirmation of the Baker/Nix/DeWitt Plan (Trustee's Plan of Reorganization, as thrice amended) was not timely filed, since the Order of this Court dated August 30, 1973, required that any such objections be filed on or before September 24, 1973. The portion of the Objections going to the Baker/Nix/DeWitt proposal for adequate protection of dissenting shareholders, however, was timely filed, the last day for filing pursuant to the Order of August 30, being October 1, 1973.

In addition, at the hearing held on October 3, 1973 (in accordance with the Court's Order of August 30, 1973) Mr. McCallum, appearing on behalf of Debtor, filed a Motion to Dismiss Chapter X Proceeding and "allow the same to be treated as if filed under Chapter XI of the Bankruptcy Act."

IV

Hearing of October 4, 1973

At the hearing on October 4, 1973, this Court first considered the Motion to Dismiss, heard argument from counsel for all parties present and deferred ruling.

Second, the Court heard argument and evidence with respect to the Stockholders' Plan, including the timeliness of the filing

thereof, the timeliness and adequacy of the deposit and the merits thereof.

Third, pursuant to the agreement of counsel for Baker/Nix/DeWitt, Atlanta Group, Price and Trustee at a pre-trial conference held with this Court prior to the hearing on October 4, the Court did not hear argument or consider evidence with respect to the Objections of Baker/Nix/DeWitt to Claims No. 100, 101 and 103 and certain other objections set forth in their "Application in Aid of Confirmation Invoking Section 216(8) of the Bankruptcy Act."

Fourth, this Court heard evidence and argument with respect to the "Application in Aid of Confirmation Invoking Section 216(8) of the Bankruptcy Act" filed by Baker/Nix/DeWitt, by and through the Trustee. This included the nature of the protection, allowability and sufficiency thereof and objections thereto, including the "Objections to Confirmation of Baker-Nix Plan and to Baker-Nix Proposal for Dealing with Stockholders;" reserving its determination on whether that portion of the objections going to confirmation were timely filed. In addition, the Court heard argument with respect to confirmation of the Baker/Nix/DeWitt Plan (Trustee's Plan of Reorganization, as thrice amended) and the question of valuation of the stock of dissenting shareholders. Finally, the Court heard testimony from Messrs. Baker/Nix/DeWitt as to the source of funds to be used by them to fund the Plan before the Court.

The Court reserved ruling on all of these matters and continued the hearing until October 17, 1973 (with respect to the hearing of October 4, 1973, see Transcript of Proceeding).

Subsequent to the hearing a "Memorandum of the Securities and Exchange Commission with Respect to Confirmation of the Trustee's Amended Plan of Reorganization and other Matters" (dated October 11, 1973) was filed with the Court.

On the afternoon of October 16, 1973, Mr. McCallum, with the consent of counsel for the respective parties, requested a postponement and continuance of the October 17, 1973, hearing to allow time for the Atlanta Group, Price and Baker/Nix/DeWitt to attempt to reach a compromise as to their differences. The request for continuance was granted and the hearing rescheduled for November 7, 1973.

On November 6, 1973, Trustee filed a "Trustee's Report on Proposal of Plan." Attached to the Report was a proposal for a plan sponsored by a group known as "The Racing Associates," composed of Melvin L. Joseph of Georgetown, Delaware, and Richard S. Howard of Charlotte, North Carolina, along with W. O. Wheatley, Smyrna, Delaware: Alan Guerrier, Ocean City, Maryland; Ed Griffin, Rockingham, North Carolina; David Mikelait, Salisbury, Maryland; and Ted Jones, Rehoboth, Delaware.

At the hearing on November 7, 1973, Trustee filed a "Trustee's Amended Report on Proposal for Plan," attaching thereto an amendment (dated November 6, 1973) to the earlier proposal of The Racing Associates.

At the hearing on November 7, 1973, the Court heard from counsel regarding any additional argument or evidence with respect to those matters considered at the October 4, 1973, hearing.

The Court, reserving its ruling with respect to the right of The Racing Associates to have their proposal considered at all (since it was not timely filed, the last day for filing having elapsed on September 24, 1973, in accordance with the Court's Order of August 30, 1973), heard argument from counsel for the respective parties present and statements from certain shareholders regarding The Racing Associates proposal. The Court also heard testimony from Mr. Richard Howard of Charlotte

Motor Speedway regarding problems in the stock car racing industry generally and the specific effect of current energy shortages on the future of stock racing.

The Court subsequently received a letter dated November 9, 1973, from counsel for The Racing Associates, Mr. Fred L. Somers, Jr., setting forth certain objections to the Trustee's Plan of Reorganization, as thrice amended. The Trustee responded to said letter by a letter dated November 14, 1973, filed with this Court.

The Court is now prepared to rule with respect to all of the various matters heretofore enumerated, which have occurred since August 22, 1973 (the date on which voting closed with respect to the Trustee's Plan of Reorganization as thrice amended).

V

Consideration of Motion to Dismiss

This Court is now prepared to rule on the Motion to Dismiss as filed by Debtor's counsel.

The Motion to Dismiss requests the Court, pursuant to Section 236 of the Bankruptcy Act, "if it appears that no feasible Plan of Reorganization can be proposed by the Trustee, which can be accepted by all of the affected classes without substantial further litigation," to dismiss the petition for Chapter X filed in this Court on January 18, 1971, and "allow the same to be treated as if filed under Chapter XI of the Bankruptcy Act." The Motion to Dismiss further states that counsel for the Debtor "believes that a plan of rearrangement of the unsecured debts can be proposed to the Court within fifteen days of said conversion; and that in such a situation secured interests and the stockholders can be adequately protected and dealt with by

the debtor itself." Finally, the Motion requests that the Debtor be returned in possession or its officers appointed as trustees.

First, notwithstanding an invitation from the Attorney for Trustee, Debtor has presented nothing to this Court to substantiate its allegation to the effect that it "believes that a plan of rearrangement of the unsecured debts can be proposed to the Court within fifteen days of said conversion and that in such a situation secured interests and the stockholders can be adequately protected and dealt with by the Debtor itself."

Second, at the time of the filing of the voluntary petition under Chapter X on January 18, 1971, pursuant to Sections 101 and 130(7) of the Bankruptcy Act, the petition alleged, *inter alia*, "that adequate relief cannot be obtained under Chapter XI." The petition was approved by the Court upon finding that it was filed in "good faith," as required by Sections 142 and 146 of the Act, and that Chapter XI would not provide adequate relief, as required by Section 146(2). At this time, there is no reason for the Court to believe that adequate relief can now be obtained under Chapter XI. In fact, some two and three-quarter years have expired since the filing of the Petition under Chapter X and the Court now has before it, after numerous hearings, a plan of reorganization which has been overwhelmingly approved by the creditors (though decisively disapproved by the shareholders) and a proposal for adequate protection of the shareholder class.

Third, it should be noted that Chapters X and XI are not alternate routes of relief, subject to the Debtor's choice. As pointed out by the United States Supreme Court in *Securities and Exchange Commission v. American Trailer Rentals Company*, 379 U.S. 594, 604-607 (1965), these Chapters provide mutually exclusive paths of relief which the Court should consider and determine in light of the "needs to be served." That determination was made on January 18, 1971, and there is no

fact before this Court warranting any changes of opinion. In fact, the experience of this Court in this proceeding over the last two and three-quarter years validates the wisdom of the Court's initial choice of Chapter X.

During the course of this proceeding, it has become apparent to the Court that Debtor's primary problem has been the substantial amount of secured debt held by Security National Bank (approximately $1,000,000), with which a Chapter XI proceeding is not designed to deal. A considerable amount of the Court's time, and that of its duly appointed officers, has been spent in hearings and negotiations with holders of the secured debt. Should this proceeding be dismissed and converted to Chapter XI, the secured creditor and the junior lienholders would have to be dealt with promptly in some manner which is not now apparent to this Court.

Finally, and perhaps most important of all, Section 236 of the Act specifies five (5) situations in which the Court may grant a dismissal of a Chapter X proceeding. The possibility of "substantial further litigation" as set forth in the Motion to Dismiss, is not one of those grounds. In any event, none of the grounds contemplated by Section 236 provides for conversion of a Chapter X proceeding to a Chapter XI arrangement, but contemplates an adjudication or dismissal by the Court after evaluation of the interest of the creditors and stockholders.

Accordingly, for the reasons hereinabove set forth, this Court concludes that the Motion is not well taken and is not in the best interest of the creditors and stockholders of this Debtor. Accordingly, said Motion should be and is hereby denied.

VI

"Plan of Reorganization Sponsored by the Debtor, a Majority of Its Directors and Mr. James H. Price"

The above-styled Plan is submitted by Messrs. T. J. Black, Loyd Smith, Paul Jones, Mrs. Paul Jones and James H. Price.

It is undisputed that the deposit required by this Court's Order of August 30, 1973, agreed to by the Court and Trustee on September 17, 1973, and recited in the Plan itself, to-wit: an assignable certificate of deposit in the amount of $100,000.00 drawn on the First National Bank of Atlanta, was not tendered to this Court or its Trustee on or before September 24, 1973. In short, the filing of the Plan and the making of the deposit was not in compliance with the Order and directives of this Court and was not timely or adequate.

Even if this Court overlooks the above infirmities, which it is not inclined to do, and reaches the merits of the Plan, it must conclude that the Plan is virtually identical to the Baker/Nix/DeWitt Plan both with respect to the treatment of creditors and shareholders. The primary difference in the Shareholders' Plan is that it provides that the monies to fund the Plan will be obtained through a guaranteed securities offering to existing shareholders of Debtor. It is proposed that two shares of registered (i.e., freely tradeable) stock of Debtor will be issued in exchange for each share of Debtor's stock now outstanding, together with $.75. It is further proposed that the offering will be made as a part of an issue of 550,000 shares and will be distributed through a national and reputable brokerage firm at a negotiated price not to exceed $15,000.00. There has been no indication, however, that any efforts have been made to procure even a tentative understanding with such a firm. It is further provided that Mr. James H. Price will guarantee to take up at the offering price any shares not subscribed to by the existing shareholders.

If such an offering is successful, it will generate, according to the Court's calculations, the sum of $412,500.00, less brokerage fees and any other expenses associated with the sale (including, but not limited to, attorneys' fees). Accordingly, the sums from this source would generate something less than $400,000.00. The present Baker/Nix/DeWitt Plan, however, provides for $350,000.00 with an additional loan in the amount of $175,000.00 to be made at confirmation, and a $150,000.00 loan within 90 days following confirmation, making a total of $675,000 to fund the Plan and provide necessary working capital. The Shareholders Plan, however, provides (see Article I, Subsection E, at page 10) that the sponsors "if it is necessary for the operation of the corporation to secure additional working funds, they will make or procure additional funds to the extent of $300,000.00 in the form of loans upon such terms as the Board of Directors may approve." Accordingly, whether additional funds will be obtained is completely dependent upon a decision made by the Board of Directors (which will likely be comprised and, perhaps, controlled by the Plan sponsors) as to whether such loans are "necessary."

It is clear to this Court that $400,000.00 will be inadequate to fund the Plan and provide the necessary working capital to keep Debtor from returning to this Court. In fact, the history of Atlanta International Raceway, Inc. from 1958 until the date upon which the Petition was filed on January 18, 1971, reflects that inadequate capitalization and working capital was one of the primary deficiencies leading Debtor to this Court. For this Court to approve a plan which does not have some reasonable assurance of avoiding the problem of inadequate capitalization and working capital would not be in the best interest of the creditors and shareholders of Debtor.

Furthermore, one of the proponents of this Plan, Mr. James H. Price, submitted a prior plan to this Court on or about February 5, 1973, and later, at the request of his counsel, that plan

was withdrawn and an Order entered by this Court allowing same. In addition, Messrs. T. Jack Black and Loyd Smith have been closely associated with the management of Debtor for several years. In fact, these individuals were members of the Board of Directors at the time the Petition for Chapter X was filed in this Court on January 18, 1971, and Mr. Black was President. Without reflecting upon the ability of these individuals, the Court notes that they must assume some responsibility for the present circumstances in which this Debtor now finds itself. There is nothing in the record that would lead this Court to believe that, under their leadership, this Debtor could not find itself in financial difficulty once again if this Court should approve a plan along the lines suggested.

In addition, it is proposed by the sponsors that Mr. William J. Whittle, a copy of whose "confidential resume" is attached to the Plan of Reorganization as filed, would assume a position as officer of the company and would be one of the primary, if not the primary, individual charged with the day to day management of Debtor pursuant to the proposed Plan. While Mr. Whittle's resume is impressive it does not reflect any prior involvement by him in the management of a motor speedway such as here involved. Once again, this Court must reflect upon the investigation of Debtor over the past two and three-quarter years. That investigation reveals that another reason why Debtor is before this Court today is the lack of full time, experienced management. On the contrary, the Baker/Nix DeWitt Plan involves Mr. L. G. DeWitt who is presently and has for several years been involved with the successful ownership and management of a motor speedway. In addition, Mr. Nix served as manager of Debtor under the present Trustee and his predecessor for several races, which races were, as the record reflects, highly successful. Prior to that time, Mr. Nix had been involved with Debtor and is, from this Court's observation, intimately familiar with its problems. In addition, Mr. Baker is not unknown to the racing industry.

Furthermore, as pointed out during the hearing on October 4, 1973, the Stockholders' Plan, as drawn, violates certain provisions of the Bankruptcy Act which this Court will not belabor (see Transcript of Proceedings of October 4, 1973, hearing).

Assuming that all of the deficiencies heretofore enumerated were corrected, there is the question of whether there is anything substantial to be gained by the Shareholders' Plan. If this Court should refuse to confirm the Baker/Nix/DeWitt Plan, with a provision for adequate protection, then it is certain that it will take several months before the Shareholders' Plan could be confirmed, following the procedures outlined in the Bankruptcy Act, especially in light of the fact that it presupposes an offering of stock to fund the Plan. In addition, there is no guarantee that once the Plan is submitted, it would be acceptable to the classes of creditors who have suffered under prior administrations of Debtor and who could well vote overwhelmingly against such a Plan. To take such action in light of the present energy crisis and its implications for the future of automobile racing (see Transcript of Proceeding, November 7, 1973, testimony of Richard Howard) could be quite detrimental to the creditors and shareholders of Debtor.

For the reasons herein stated, this Court dismisses said Plan.

VII

Objections to Confirmation of Baker/Nix/DeWitt Plan and Voting in Regard Thereto

On October 1, 1973, certain objections were filed by counsel for Debtor styled "Objections to Confirmation of Baker/Nix/Plan and to Baker/Nix Proposal for Dealing With Stockholders." As this Court noted, objections with respect to confirmation of the Baker/Nix/DeWitt Plan, pursuant to this Court's Order of August 30, 1973, were to be filed on or before

September 24. Accordingly, that portion of the objections going to the confirmation of the Plan (not that portion going to the Baker/Nix/DeWitt proposal for adequate protection) were not timely filed, notwithstanding the allegation therein that the objections were based upon evidence obtained since the close of deadlines previously set by the Court.

Even if this Court should find, however, that there was a timely filing and reaches the merits of the objections, this Court must overrule all objections.

First, it is contended that evidence accrued since the close of deadlines previously set by the Court shows that the Court cannot at this time satisfy itself that the votes in favor of the Baker/Nix Plan have not been procured by means forbidden by the Act as is required. This Court was contacted by counsel for Debtor on September 26, 1973, and a conference was held by this Court with Debtor's counsel, Trustee, Attorney for Trustee and Price counsel. During the course of this conference, the Court was advised that some of the votes with respect to the Baker/Nix Plan could have been improperly obtained. It became clear, however, during the course of the meeting that the alleged evidence of possible improper solicitation had been available to Debtor's counsel (with the exception of certain alleged evidence relating to the First National Bank of Atlanta allegation occurring on the morning of September 24, 1973) for some time. Notwithstanding this fact, the Court advised all persons present that an investigation should be made into all allegations of impropriety to determine if certain votes for the Plan, or the Plan itself, should be disqualified.

At the meeting, counsel for Debtor requested that any investigation be made in such a manner as not to encourage further discord among the shareholders of Debtor which could eventually result in the impossibility of getting any plan approved. Accordingly, it was suggested, that the Court direct

the Attorney for the Trustee, with First National Bank counsel, Price counsel, Debtor counsel, Baker/Nix/DeWitt counsel and Trustee present, to take the depositions of 13 individuals to determine what, if any, evidence existed. It was agreed upon by all parties that counsel for the Trustee would commence these depositions on September 27, 1973, at 5:00 P.M. at his offices and that all questions during the course of these depositions would be propounded by the Attorney for the Trustee and that all counsel present would have an opportunity to present to Trustee's counsel any questions which they desired propounded. Further, that the originals of the depositions would be forwarded directly to this Court for an *in camera* examination by it.

The depositions having been concluded, this Court has carefully reviewed the approximately 500 pages of transcript (consisting of approximately 12 hours of testimony) and now concludes, on the basis of its review, that there is insufficient evidence to conclude that any votes solicited in favor of the Baker/Nix/DeWitt Plan were improperly solicited by Baker, Nix, DeWitt, their representatives, or the Trustee. Even if this Court had found evidence of improper solicitation, under Section 203 of the Bankruptcy Act, it could have only disqualified those votes in favor of the Plan which were procured by improper solicitation.

It is alleged that the votes of Mr. T. Jack Black, as a creditor and sharholder, were, perhaps, improperly solicited. While the evidence does not sustain this, Mr. Black, both as a creditor and shareholder, voted against the Plan and his votes were counted in the vote against the Plan.

Secondly, it was alleged that Mr. Howard and Charlotte Motor Speedway, which has a junior lienholder claim of approximately $40,000 and an unsecured claim of $19,000, were approached in a manner that amounted to improper solicitation.

While the Court does not find sufficient evidence with respect thereto, even if the Court disqualified the vote of Howard and Charlotte Motor Speedway both as a junior lienholder and unsecured creditor, this would not change the favorable vote by all classes of creditors for the Baker/Nix/DeWitt Plan.

In addition, it was alleged that there might be some question of the propriety of solicitations allegedly made by the Trustee to Mr. McCallum of the law firm of Heyman and Sizemore, counsel for Debtor in this proceeding, and an unsecured creditor for approximately $26,000. This Court finds no evidence to support such a contention. Even if such evidence had existed, this would not affect the outcome of the vote since Heyman and Sizemore voted against the Plan.

Finally, it was alleged that the First National Bank of Atlanta, a junior lienholder for approximately $140,000.00, may have been improperly solicited. The Court found no evidence to support this allegation. If this Court chose to disqualify First National Bank's vote in favor of the Plan, as a junior lienholder, as well as the Richard Howard/Charlotte Motor Speedway vote in favor of the Plan, as a junior lienholder, this would not result in a negative vote with respect to the junior lienholder class since all remaining members of the class accepted the Plan. Accordingly, all objections by Debtor's counsel with respect to the question of improper solicitation of votes are hereby denied.

Secondly, it is set forth in the untimely filed objections to confirmation that "evidence similarly procured indicates that the Baker/Nix Plan is not based upon any substantial equity infusion by the proponents of said Plan, but will be based upon loan funds, the terms of whose availability have not been fully disclosed to the Court."

After this objection was filed, this Court heard testimony from Messrs. Baker, Nix, and DeWitt, at the hearing on October 4, 1973 (see pages 122 through 142 of the Transcript of Proceed-

ing), with cross-examination by Mr. McCallum of the law firm of Heyman and Sizemore, counsel for Debtor, which testimony revealed that the equity investment (a total of $350,000.00 to be borne equally by Baker/Nix/DeWitt) would be obtained as follows: from the personal funds of Nix and DeWitt and from funds derived by Baker through the pledge or discount of a $300,000 note held by him (obtained from the sale of one of his businesses). Even if 100% of the equity infusion ($350,-000.00) was to be obtained by loans to the three individuals, it is the opinion of this Court that this would have absolutely no effect with respect to Debtor so long as the net worth of these gentlemen, whose net worth has been examined by the Court and has been found to be substantial, was not impaired by the loan(s) so as to jeopardize performance of the Plan, and so long as the Debtor in no way guaranteed or assumed any obligation with respect to the payment thereof.

Thirdly, it is alleged in the untimely filed objections that "evidence newly discovered by the debtor (but which has long been available to the Trustee) indicates an intention and willingness on the part of the proponents of the Baker-Nix Plan to engage in self-dealing at the expense of the corporation." This allegation is apparently based upon a proposal from the First National Bank of Atlanta to Messrs. Baker/Nix, dated April 18, 1973, which was rescinded on May 2, 1973 (see Exhibits to the deposition of Mr. Wickland) to the effect that a loan fee would be paid to Baker/Nix under certain circumstances. It should be noted that this proposal from the First National Bank was solicited by Messrs. Baker/Nix with the knowledge and sanction of the Trustee and this Court, was considered by this Court after it was obtained, was disapproved by the Trustee and Court as not being feasible and was rescinded by the Bank, prior to the Court's initial hearing for approval of the Baker/Nix Plan on May 30, 1973. Its existence, therefore, could not in any conceivable way be deemed to constitute "self-dealing" or in any way affect or taint the Plan now before this Court.

In addition to the objections filed by counsel for Debtor, certain objections have been filed by counsel for Baker/Nix/DeWitt, all of which were timely filed and which are entitled "Application in Aid of Confirmation Invoking Section 216(8) of the Bankrupcy Act," "Objection to Allowance of Claim No. 100 of T. Jack Black," "Objection to Allowance of Claim No. 101 of T. Jack Black," and "Objection to Allowance of Claim No. 103 of Lamar W. Sizemore."

In the "Application," counsel for Baker/Nix/DeWitt contends that this Court erred in directing Trustee to count all ballots filed by creditors and shareholders of record in this proceeding with respect to the Plan. The primary objection is with respect to the counting of shareholder votes. It is contended that only those shareholders filing proofs of claim on or before the day for the close of voting, to-wit, August 22, 1973, should have been counted; and if only those shareholders had been counted, this would have resulted in a favorable vote by the shareholder class. This Court ruled, however, that all shareholders of record as reflected in the schedules of Debtor filed in this proceeding, should be entitled to vote, notwithstanding the fact that they had not filed proofs of claim. The reason for this ruling was that a review of the record by the Court reflected that no notice of a bar order was given to shareholders prior to August 22, 1973, with respect to the filing of proofs of claim by them. Accordingly, this Court ruled and now affirms its ruling that in order to treat all shareholders equitably (in light of the fact that no notice of a bar order was ever given to shareholders), all shareholder votes should be counted; and that count having been taken, the vote is decidedly against the Baker/Nix/DeWitt Plan as reflected by the report of the Trustee filed with this Court on August 30, 1973.

In addition, there are objections to allowance of Claims No. 100, 101, and 103, for which Baker/Nix/DeWitt's counsel has not insisted upon a hearing or ruling. In short, whether this Court allows or disallows one or all objections by counsel for

the Debtor, there would still be a favorable vote for the Plan by the unsecured creditors. Accordingly, the Court need not reach the question of whether the negative votes by unsecured creditors, totaling three in number and approximately $28,-000.00 in amount, should have been counted by Trustee.

VIII

"The Racing Associates" Proposal

On or about October 17, 1973, a proposal was presented to Trustee by a group known as "The Racing Associates" and subsequently filed with the Court (see "Trustee's Report on Proposal for Plan"). The original proposal was amended by letter from their counsel dated November 6, 1973, and was filed by the Trustee with this Court on November 7, 1973 (see "Trustee's Amended Report on Proposal for Plan"). This proposal, as amended, was presented to the Court by counsel for The Racing Associates and argument was heard from counsel for Debtor, Trustee, Attorney for Trustee, counsel for Price and other interested parties and shareholders present at a hearing on November 7, 1973.

In substance, the amended proposal provides for taking out Security National Bank by refinancing arrangements not disclosed to the Court, no written commitment being in existence at this time; for the payment in full to all creditor classes; and for the guaranteed payment to all shareholders of $1.50 per share. This proposal does not give the shareholders an option to sell their stock but requires the sale of their stock.

In addition, the proposal is not timely filed (the filing date having elapsed on September 24, 1973) and counsel for The Racing Associates acknowledges that the Court is not required to even consider the proposal.

Even if this Court should reach a consideration of the merits of the proposal, it is concerned with several aspects thereof.

First, it would take several months to present this proposal as a Plan, following approval and the other necessary steps required by the Bankruptcy Act, to the creditors and shareholders of Atlanta International Raceway, Inc. for their vote, followed by confirmation hearings. This proceeding is already two and three-quarter years old and this could mean it would go into three and one-half to four years. Second, there is no assurance that the Plan would be accepted by the shareholders and the Court could be in precisely the same position months from now with another adequate protection proposal before it. In fact, in open Court on November 7, 1973, and by subsequent written communication to this Court, counsel for Debtor has indicated that while the directors of Debtor would consider the proposal, they would be willing to accept same only if the price were $2.00 per share. Third, this Court heard from several shareholders of Debtor at the hearing on November 7, 1973, all of whom expressed great discontent with any proposal that would require shareholders to sell their stock and not give them an option of remaining as shareholders of Debtor. Specifically, Mr. Whittle, speaking on his own behalf as the holder of something in excess of 12,000 shares and on behalf of Mr. Price as the holder of approximately 62,000 shares, indicated that such a proposal would be objectionable to him and Mr. Price (see Transcript of Proceedings of November 7, 1973). Fourth, during the course of the hearing on November 7, 1973, counsel for Baker/Nix/DeWitt stated in open Court that notwithstanding the valuation of the stock, which this Court has found to be approximately $1.00 per share, Baker/Nix/DeWitt would be willing to guarantee and pay $1.60 per share and would give to all shareholders the option to sell or not to sell their stock. Fifth, all classes of creditors of Debtor have overwhelmingly approved the Baker/Nix/DeWitt Plan.

For the above reasons herein stated, this Court must conclude that the proposal is not timely, but even if timely does not justify, on its merits, submission to the shareholders and creditors of Debtors.

IX

Baker/Nix/DeWitt Proposal for Adequate Protection

An "Application in Aid of Confirmation Invoking Section 216(8) of the Bankruptcy Act" has been filed by counsel for Baker/Nix/DeWitt by and through the Trustee, with respect to the Trustee's Plan of Reorganization, as thrice amended.

The application suggests that the shareholders, notwithstanding their overwhelming vote against the Plan, have already been adequately provided for and that nothing remains to be done with regard to the confirmation of the Baker/Nix/DeWitt Plan except the entry of such orders as are deemed necessary to confirm the same and expedite the consummation. In this regard, it is contended that under the Plan the only significant change with regard to shareholders is the dilution of their total ownership position in the Debtor to the extent that additional stock will be issued pursuant to the Plan. Accordingly, it is argued that the value of the stock does not appear to suffer any substantial diminishment. It is for this reason that Baker/Nix/DeWitt, by and through the Trustee, take the position that adequate protection is already made in the Plan for the protection of the shareholders without any monetary payment to them for the value of their stock.

This Court is aware of the position taken in 6A *Collier on Bankruptcy* (14th Edition) ¶ 10.17, at page 492, to the effect that Section 216(8)(c) would seem to allow a judge, upon confirming a plan, to disregard the nonassent of the shareholders. In this regard, *Collier* states:

> "With respect to paragraph (8)(c), circumstances may be envisioned where the provision might be useful. Assuming a solvent debtor with an equity for stockholders, a situation could arise where the stockholders would refuse to accept a plan even though it provided for the issuance of

> new securities to them for the full value of their equity. In such a case, it seems that under paragraph (8)(c), the judge upon confirming the plan could order that the stockholders be given the new securities and their nonassent disregarded. Under the circumstances of the case, this would give the stockholders all the protection to which they would 'equitably and fairly' be entitled in any event, and it is difficult to see how they could properly complain."

Notwithstanding the contention by counsel for Baker/Nix/DeWitt in accordance with this statement in *Collier*, since the application was filed on September 24, 1973, counsel for Baker/Nix/DeWitt have agreed to guarantee and pay $1.60 per share for the value of the stock. This statement was made in open Court at a hearing on November 7, 1973. Accordingly, this Court deems the prior position taken by Baker/Nix/DeWitt to be abandoned in light of subsequent events. In the same regard, the alternative provision set forth in the application filed on September 24, 1973, to value the stock at $.75 per share is likewise abandoned. The Court should note, however, in passing that there appears to be substantial justification for the $.75 per share figure. In fact, it is the same figure which is used in the Shareholders' Plan, at which figure they propose to sell 550,000 shares of stock to existing shareholders. Further, there is evidence before the Court that Mr. Price purchased 62,000 shares of Debtor's stock at $.75 a share within the last several months.

Notwithstanding the above, this Court found an approximate value of $1.00 per share in its Order of July 11, 1973. This is based upon both the calculations of the Securities and Exchange Commission and Mr. Roberts, who conducted an appraisal pursuant to the orders of this Court. In addition, a subsequent financial statement for the three months ended July 31, 1973 (unaudited) prepared by Frank J. Pelzer, Certified Public Accountant duly appointed by Order of this Court, would indicate that the total stockholders' equity for the period ending

July 31, 1973, is only $269,052, with some 320,000 shares of stock outstanding. This would provide support for the $.75 figure. In addition, Mr. Pelzer makes no allowance for certain improvements to the race track which it now appears this Court may have to authorize in the approximate amount of $200,-000.00 in order to pave the track. This would further affect the stockholders' equity.

In any event, the Court need not reach any of the alternative valuation proposals set forth in the application since it is proposed by Baker/Nix/DeWitt that they will guarantee and pay $1.60 per share, which is higher than any figure suggested to this Court either by The Racing Associates, the Stockholders' Plan or any other proposal prior to the close of the evidence. Clearly, $1.60 per share is greatly in excess of the value of said stock and is deemed by this Court to provide more than adequate protection under Section 216(8) of the Act.

It should be noted, however, that in the Objections filed by counsel for Debtor on October 1, 1973 ("Objections to Confirmation of Baker-Nix Plan and to Baker-Nix Proposal for Dealing with Stockholders"), it is indicated that $.75 per share is not based upon a capitalization of prospective earnings and, further, that no capacity has been shown on the part of the proponents to bear the expense of buying the stock of those shareholders who elect to take the $1.60 per share payment for their stock. This argument has little merit in light of the $1.60 proposal now before the Court by Baker/Nix/DeWitt. The $1.00 per share figure found by the Court in its Order of July 11, 1973, was based upon a capitalization of prospective earnings, and no evidence whatsoever has been adduced to show that prospective earnings of this Debtor could raise the per share value higher than $1.60.

Also set forth in the objections filed by counsel for Debtor is the objection that only five working days have been allowed to

consider responses for the forced liquidation of the shareholder class; the proposals made for that liquidation have not been forwarded to all of the shareholders; and said shareholders have not even yet had the time run within which they have been notified by the Court that they may file their claims. First, this Court's Order of August 30, 1973, notice of which was sent to all creditors, shareholders and interested parties, provided that a hearing would be held on October 4, 1973, with respect to any proposals for adequate protection. Said hearing was held on October 4, 1973, and since that time, there has been additional opportunity for argument and hearing thereon. Obviously, before the Plan is finally confirmed by the District Judge, additional notice will be given to all stockholders, creditors and interested parties of this Debtor as to the Plan, the provisions for adequate protection and the recommendations of the undersigned, with ample opportunity to file objections, if any.

Furthermore, the objection that shareholders have not even yet had the time run within which they have been notified by the Court that they may file their claims is not well founded. All shareholders were notified by the Court of their right to vote for or against the Plan, which voting closed on August 22, 1973. All ballots cast were counted, as herein noted, without regard to whether or not they had filed a formal proof of claim. The subsequent notice provided for by the Order of August 30, 1973, setting a bar date of December 31, 1973, in no way affects the validity or integrity of the vote taken on August 22, 1973.

Finally, this Court cannot concur with the assertion that the provision for adequate protection is a forced liquidation of the shareholder class. Under the proposal for adequate protection, a shareholder has the option of electing or not electing to sell his stock.

Counsel for Mr. Price has suggested to this Court that, as a matter of law, Section 216(8) of the Act cannot be applied where there is only a single class of shareholders. While the

Court can find no specific case on this point, such an interpretation of 216(8) would defeat the entire purpose thereof. Section 216(8) provides that a plan may provide for "any class," which this Court reads to be one or several. Furthermore, the framers of the Bankruptcy Act apparently anticipated that argument might arise over the meaning of words in singular or plural form. Therefore, it is provided in Sections 1(34) and (35) of the Act [U.S.C. §§ 1(34) and 1(35)] that "words importing the plural number may be applied to and mean only a single person or thing" and vice versa. These definitions are applicable in reorganization proceedings, pursuant to § 102 (11 U.S.C. § 502) of the Act, since "they are not inconsistent or in conflict with the provisions of this Chapter." It should be noted that the Securities and Exchange Commission has filed a Memorandum with this Court concurring with the Court's view with respect to this matter.

This Court has received a letter from counsel for The Racing Associates and/or Mr. Richard S. Howard/Charlotte Motor Speedway, dated November 9, 1973, raising certain objections with respect to the Baker/Nix/DeWitt proposal for adequate protection. The time has long since expired (October 1, 1973), pursuant to this Court's Order (August 30, 1973), for filing objections.

Even if this Court should reach the merits of the objections, however, it must deny same. Without belaboring the points raised, this Court finds that the Trustee has more than adequately refuted each point raised in a letter dated November 14, 1973, which has been filed with this Court. This Court adopts the position taken by the Trustee in his response, and further states: (1) that there is no violation of the absolute priority rule since the monies used to purchase the share of dissenting stockholders at $1.60 per share will not come from the estate of Debtor or the $675,000.00 to be paid into the estate by Messrs. Baker-Nix-DeWitt, but the monies necessary for the

purchase of said shares will be additional monies provided by Baker/Nix/DeWitt and will not be in the form of a loan to Debtor and will not become an obligation of Debtor; (2) that those who become shareholders by virtue of implementation of the Plan will not be eligible to exercise the option, since this would be contrary to the very nature and purpose of Section 216(8) of the Act.

Accordingly, this Court concludes that the payment of $1.60 per share to all shareholders of Debtor electing to accept payment of $1.60 per share, in lieu of remaining as shareholders, provides more than "adequate protection" pursuant to Section 216(8). It may result, however, in Baker Nix/DeWitt obtaining more than 52% of the stock of Atlanta International Raceway, Inc. Accordingly, this Court is of the opinion that once the option has been offered to shareholders and this Court knows the exact number of shares and shareholders desiring to exercise the option, then all shareholders of Debtor should first be given an opportunity to purchase at the price of $1.60 per share under the following procedure:

(1) Any shareholder of Debtor (other than those becoming shareholders by virtue of implementation of the Plan or, who are otherwise disqualified by this Court) may, upon written request to the Trustee (in accordance with procedures and time limits to be specified by this Court at a later date), indicate their interest in purchasing all or part of any shares offered for sale pursuant to the exercise of the option, but the number of shares requested shall not exceed the number of shares held by the shareholder at the time of confirmation;

(2) If the total number of shares requested exceeds those shares available for sale, then instead of the "one for one" purchase [see subsection (1) above], the purchase shall proceed on a "pro rata basis" (determined by the shareholders' percentage of ownership of Debtor at the time of confirmation) and each shareholder shall be entitled to purchase his pro rata share.

Any shares remaining unsold after implementation of the above procedure shall be purchased by Baker/Nix/DeWitt at $1.60 per share. In no event, however, shall Baker/Nix/DeWitt own less than 52% of the total number of shares outstanding at the conclusion of the implementation of the Plan.

X

Confirmation

This Court in its Report of June 18, 1973, and its Order of July 11, 1973, found the Baker/Nix/DeWitt Plan to be fair, equitable and feasible. The Plan, as thrice amended, was presented to all shareholders, creditors and interested parties of Debtor. This vote resulted in an overwhelming acceptance and approval of the Plan by all classes of creditors. It likewise resulted in a decisive defeat of the Plan by the shareholder class.

Since that time, Messrs. Baker, Nix and DeWitt, acting by and through the Trustee, have offered adequate protection by agreeing to guarantee and pay to shareholders $1.60 per share for those shareholders electing to sell their stock, but have not required, in the interest of all shareholders, that a shareholder relinquish his equity position. Furthermore, in order to give those proposing the Shareholders' Plan and all other shareholders of Debtor an opportunity to increase the percentage of their ownership position in Debtor, this Court has provided certain options as set forth in Part IX hereof.

Finally, this Court has been advised by Trustee that no shares of Debtor's stock have been transferred on the books of the Company since January 18, 1971, although requests for transfer have been made to him. The Trustee is directed to file a written report with the Court setting forth each request and his recommendations in connection with the disposition thereof. Such recommendations will be considered by the Court at an appropriate date. This procedure should ensure that there will be no trad-

ing in the stock in anticipation of this Report which will be detrimental to stockholders of Debtor. Further, notice should be given to shareholders, creditors and interested parties of the provisions of this Report, in such form as shall be approved by the Court.

Accordingly, the undersigned concludes that the Trustee's Plan of Reorganization, as thrice amended, and the adequate protection provided for the dissenting shareholder class is fair, equitable and feasible and that it should be, and hereby is, recommended for confirmation. Specific procedures for the implementation of the provisions set forth herein shall be prescribed by subsequent Orders of this Court at the appropriate time.

After 2:00 P.M. on Tuesday, November 20, 1973, Trustee received (see letter dated November 20, 1973, from David F. Kell, Jr., Esq. to Trustee), an amendment to the Stockholders' Plan. There is nothing new in the amendment with the following exception: Mr. Price agrees to purchase all dissenting shareholder stock at $1.65 per share. This Court has reviewed the amendment and concludes that it does not alter or affect the findings and recommendation set forth in this Report.

Shortly after noon on Wednesday, November 21, 1973, the Court received a copy of a letter purporting to revoke "The Racing Associates" proposal for reorganization, as amended (see copy of letter dated November 21, 1973, from Fred L. Somers, Jr., Esq. to Trustee). In view of this Court's findings, conclusions and recommendations set forth herein, the Courts considers the attempted revocation to be moot.

The undersigned recommends that the foregoing findings and recommendations be adopted and made the Order of this Court.

This 27 day of November, 1973.

/s/ W. HOMER DRAKE, JR.
W. HOMER DRAKE
Bankruptcy Judge and Special Master

CHAPTER X

Corporate Reorganizations

(United States Code, Title 11, Chap. 10, Secs. 501–676.)

ARTICLE I—CONSTRUCTION.

(11 U.S.C. §§ 501–502.)

SEC. 101. The provisions of this chapter shall apply exclusively to proceedings under this chapter.

SEC. 102. The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That section 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors", and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 128 of this Act, and the date of adjudication shall be taken to be the date of approval of a petition filed under section 127 or 128 of this Act except where an adjudication had previously been entered.

ARTICLE II—DEFINITIONS.

(11 U.S.C. §§ 506–507.)

SEC. 106. For the purposes of this chapter, unless inconsistent with the context—

(1) "claims" shall include all claims of whatever character against a debtor or its property, except stock, whether or not such claims are provable under section 63 of this Act and whether secured or unsecured, liquidated or unliquidated, fixed or contigent;

(2) "commission" shall mean any commission or public authority created by any law of the United States or of any State, having regulatory jurisdiction over a public-utility corporation;

(3) "corporation" shall mean a corporation, as defined in this Act, which could be adjudged a bankrupt under this Act, and any railroad corporation excepting a railroad corporation authorized to file a petition under section 77 of this Act;

(4) "creditor" shall mean the holder of any claim;

(5) "debtor" shall mean a corporation by or against which a petition has been filed under this chapter;

(6) "debts" shall include all claims;

(7) "executory contracts" shall include unexpired leases of real property;

(8) "indenture trustee" shall mean a trustee under a mortgage, deed of trust, or indenture, pursuant to which there are securities outstanding, other than voting-trust certificates, constituting claims against a debtor or claims secured by a lien upon any of its property;

(9) "petition" shall mean a petition filed under this chapter by a debtor, creditors, or indenture trustee proposing that a plan of reorganization be effected;

(10) "plan" shall mean a plan of reorganization proposed in a proceeding under this chapter;

(11) "securities" shall include notes, bonds, and other evidences of indebtedness, either secured or unsecured, and stock;

(12) "stock" shall include membership, shares, and similar interests in a debtor, certificates and other evidences of such membership, shares or interests, and voting-trust certificates;

(13) "subsidiary" shall mean a corporation substantially all of whose properties are operated under lease or operating agreement, or the majority of whose stock having power to vote for the election of directors, trustees, or other similar controlling bodies is owned, directly or indirectly, through an intervening corporation or other medium, by another parent corporation, a petition by or against which has been approved.

SEC. 107. Creditors or stockholders or any class thereof shall be deemed to be "affected" by a plan only if their or its interest shall be materially and adversely affected thereby.

In the event of controversy, the court shall after hearing upon notice summarily determined whether any creditor or stockholder or class is so affected.

ARTICLE III—JURISDICTION AND POWERS OF COURT.

(11 U.S.C. §§ 511–521.)

SEC. 111. Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located.

SEC. 112. Prior to the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding before adjudication.

SEC. 113. Prior to the approval of a petition, the judge may upon cause shown grant a temporary stay, until the petition is approved or dismissed, of a prior pending bankruptcy, mortgage foreclosure or equity receivership proceeding and of any act or other proceeding to enforce a lien against a debtor's property, and may upon cause shown enjoin or stay until the petition is approved or dismissed the commencement or continuation of a suit against a debtor.

SEC. 114. Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication.

SEC. 115. Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature.

SEC. 116. Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court—

(1) permit the rejection of executory contracts of the

debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate:

(2) authorize a receiver, trustee, or debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to issue certificates of indebtedness for cash, property, or other consideration approved by the judge, upon such terms and conditions and with such security and priority in payment over existing obligations, secured or unsecured, as in the particular case may be equitable;

(3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve; and

(4) in addition to the relief provided by section 11 of this Act, enjoin or stay until final decree the commencement or continuation of a suit against the debtor or its trustee or any act or proceeding to enforce a lien upon the property of the debtor.

(5) Notwithstanding any other provisions of chapter X, the title of any owner, whether as trustee or otherwise, to aircraft, aircraft engines, propellers, appliances, and spare parts (as any of such are defined in the Civil Aeronautics Act of 1938, as now in effect or hereafter amended) leased, subleased, or conditionally sold to any air carrier which is operating pursuant to a certificate of convenience and necessity issued by the Civil Aeronautics Board, and any right of such owner or of any other lessor to such air carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of chapter X if the terms of such lease or conditional sale so provide.

(6) Notwithstanding any other provisions of this chapter, the title of any owner, whether as trustee or otherwise, to vessels (as the term is defined in the Ship Mortgage Act, 1920, as now in effect or hereafter amended) leased, subleased, or conditionally sold to any water carrier which holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission, and any right of such owner

of any other lessor to such water carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of this chapter if the terms of such lease or conditional sale so provide.

SEC. 117. The judge may, at any stage of a proceeding under this chapter, refer the proceeding to a referee in bankruptcy to hear and determine any and all matters not reserved to the judge by the provisions of this chapter, or to a referee as special master to hear and report generally or upon specified matters. Only under special circumstances shall references be made to a special master who is not a referee. The appointment of a receiver in a proceeding under this chapter shall be by the judge.

SEC. 118. Repealed.

SEC. 119. Whenever under this chapter the court is required or permitted to fix a time for any purpose, the court may upon cause shown extend such time.

SEC. 120. Whenever notice is to be given under this chapter, the court shall designate, if not otherwise specified hereunder, the time within which, the persons to whom, and the form and manner in which the notice shall be given. Any notice to be given under this chapter may be combined, whenever feasible, with any other notice or notices to be given under this chapter.

SEC. 121. Where not inconsistent with the provisions of this chapter, the jurisidiction of appellate courts shall be the same as in a bankruptcy proceeding.

ARTICLE IV—PETITION.
(11 U.S.C. §§ 526–533.)

SEC. 126. A corporation, or three or more creditors who have claims against a corporation or its property amounting in the aggregate to $5,000 or over, liquidated as to amount and not contingent as to liability, or an indenture trustee where the securities outstanding under the indenture are liquidated as to amount and not contingent as to liability, may, if no other petition by or against such corporation is pending under this chapter, file a petition under this chapter.

SEC. 127. A petition may be filed in a pending bankruptcy

proceeding either before or after the adjudication of a corporation.

SEC. 128. If no bankruptcy proceeding is pending, an original petition may be filed with the court in whose territorial jurisdiction the corporation has had its principal place of business or its principal assets for the preceding six months or for a longer portion of the preceding six months than in any other jurisdiction.

SEC. 129. If a corporation be a subsidiary, an original petition by or against it may be filed either as provided in section 128 of this Act or in the court which has approved the petition by or against its parent corporation.

SEC. 130. Every petition shall state—

(1) that the corporation is insolvent or unable to pay its debts as they mature;

(2) the applicable jurisdictional facts requisite under this chapter;

(3) the nature of the business of the corporation;

(4) the assets, liabilities, capital stock, and financial condition of the corporation;

(5) the nature of all pending proceedings affecting the property of the corporation known to the petitioner or petitioners and the courts in which they are pending;

(6) the status of any plan of reorganization, readjustment, or liquidation affecting the property of the corporation, pending either in connection with or without any judicial proceeding;

(7) the specific facts showing the need for relief under this chapter and why adequate relief cannot be obtained under chapter XI of this Act; and

(8) the desire of the petitioner or petitioners that a plan be effected.

SEC. 131. A creditors' or indenture trustee's petition shall, in addition to the allegations required by section 130 of this Act, state—

(1) that the corporation was adjudged a bankrupt in a pending proceeding in bankruptcy; or

(2) that a receiver or trustee has been appointed for or has taken charge of all or the greater portion of the property of the corporation in a pending equity proceeding; or

(3) that an indenture trustee or a mortgagee under a mortgage is, by reason of a default, in possession of all or the greater portion of the property of the corporation; or

(4) that a proceeding to foreclose a mortgage or to enforce a lien against all or the greater portion of the property of the corporation is pending; or

(5) that the corporation has committed an act of bankruptcy within four months prior to the filing of the petition.

SEC. 132. The filing of a petition under this chapter shall be accompanied by payment to the clerk of a filing fee of $120 if no bankruptcy proceeding is pending, otherwise $70. Where $120 has been paid and an adjudication is entered under this chapter, $50 thereof shall be distributed by the clerk as in the case of a bankruptcy proceeding; but, if the proceeding under this chapter is dismissed and no order of adjudication is entered thereunder, such sum of $50 shall be refunded to the person paying it.

SEC. 133. Upon the filing of a petition by creditors or an indenture trustee, a copy thereof, together with a subpena returnable within ten days or such longer time as the court for cause shown may have fixed, shall be served upon the debtor, as provided in subdivision a of section 18 of this Act for service of a petition and subpena for involuntary bankruptcy.

ARTICLE V—ANSWER.
(11 U.S.C. §§ 536-537.)

SEC. 136. Within ten days after the service of the subpena and of a copy of the petition, or within such further time as the court may for cause shown allow, an answer controverting the facts alleged in the petition may be filed by the debtor.

SEC. 137. Prior to the first date set for the hearing provided in section 161 of this Act, an answer controverting the allegations of a petition by or against a debtor may be filed by any creditor or indenture trustee or, if the debtor is not insolvent, by any stockholder of the debtor.

ARTICLE VI—APPROVAL OR DISMISSAL OF PETITION.
(11 U.S.C. §§ 541-549.)

SEC. 141. Upon the filing of a petition by a debtor, the judge shall enter an order approving the petition, if satisfied

that it complies with the requirements of this chapter and has been filed in good faith, or dismissing it if not so satisfied.

SEC. 142. If an answer is not filed by a debtor to a petition against it, or if the answer filed does not controvert any material allegation of the petition, the judge shall enter an order approving the petition if satisfied that it complies with the requirements of this chapter and has been filed in good faith, or dismissing it if not so satisfied.

SEC. 143. If the answer of a debtor shall controvert any of the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issue presented by the pleadings and enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing it if not so satisfied.

SEC. 144. If an answer filed by any creditor, indenture trustee, or stockholder shall controvert any of the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issues presented by the pleadings and enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing it if not so satisfied.

SEC. 145. If any issue raised in an answer filed under section 136 or 137 of this Act has, after hearing upon notice to the debtor, creditors, indenture trustees, and stockholders entitled to controvert the allegations of the petition, already been tried and finally determined under the provisions of section 143 or 144 of this Act, such final determination shall be conclusive for all purposes under this chapter.

SEC. 146. Without limiting the generality of the meaning of the term "good faith", a petition shall be deemed not to be filed in good faith if—

(1) the petitioning creditors have acquired their claims for the purpose of filing the petition; or

(2) adequate relief would be obtainable by a debtor's petition under the provisions of chapter XI of this Act; or

(3) it is unreasonable to expect that a plan of reorganization can be effected; or

(4) a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be best subserved in such prior proceeding.

SEC. 147. A petition filed under this chapter improperly because adequate relief can be obtained by the debtor under chapter XI of this Act may, upon the application of the debtor, be amended to comply with the requirements of chapter XI for the filing of a debtor's petition, and shall thereafter for the purposes of chapter XI be deemed to have been originally filed thereunder.

SEC. 148. Until otherwise ordered by the judge, an order approving a petition shall operate as a stay of a prior pending bankruptcy, mortgage foreclosure, or equity receivership proceeding, and of any act or other proceeding to enforce a lien against the debtor's property.

SEC. 149. An order, which has become final, approving a petition filed under this chapter shall be a conclusive determination of the jurisdiction of the court.

ARTICLE VII—PROCEEDINGS SUBSEQUENT TO APPROVAL OF PETITION.

(11 U.S.C. §§ 556-559.)

SEC. 156. Upon the approval of a petition, the judge shall, if the indebtedness of a debtor, liquidated as to amount and not contingent as to liability, is $250,000 or over, appoint one or more trustees. Any trustee appointed under this chapter shall be disinterested and shall have the qualifications prescribed in section 45 of this Act, except that the trustee need not reside or have his office within the district. If such indebtedness is less than $250,000, the judge may appoint one or more such trustees or he may continue the debtor in possession. In any case where a trustee is appointed the judge may, for the purposes specified in section 189 of this Act, appoint as an additional trustee a person who is a director, officer, or employee of the debtor.

SEC. 157. An attorney appointed to represent a trustee under this chapter shall also be a disinterested person: *Provided, however,* That for any specified purposes other than to represent a trustee in conducting the proceeding under

this chapter the trustee may, with the approval of the judge, employ an attorney who is not disinterested.

SEC. 158. A person shall not be deemed disinterested, for the purposes of section 156 and section 157 of this Act, if—

(1) he is a creditor or stockholder of the debtor; or

(2) he is or was an underwriter of any of the outstanding securities of the debtor or within five years prior to the date of the filing of the petition was the underwriter of any securities of the debtor; or

(3) he is, or was within two years prior to the date of the filing of the petition, a director, officer, or employee of the debtor or any such underwriter, or an attorney for the debtor or such underwriter; or

(4) it appears that he has, by reason of any other direct or indirect relationship to, connection with, or interest in the debtor or such underwriter, or for any reason an interest materially adverse to the interests of any class of creditors or stockholders.

SEC. 159. Where the indebtedness of a debtor is less than $250,000, the judge may at any time terminate the appointment of a trustee and restore the debtor to the possession of its property, or, if the debtor has been continued in possession, terminate its possession and appoint a trustee.

SEC. 160. In any case, the judge at any time, without or upon cause shown, may appoint additional trustees and co-trustees, or remove trustees and appoint substitute trustees; and upon each such appointment the judge shall fix a hearing to be held within thirty days to consider objections to the retention in office of the trustee. At least ten days' notice of the hearing shall be given to the persons designated in section 161 of this Act.

SEC. 161. The judge shall fix a time of hearing, to be held not less than thirty days and not more than sixty days after the approval of the petition, of which hearing at least thirty days' notice shall be given by mail to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission and such other persons as the judge may designate, and, if directed by the judge, by publication in such newspaper or newspapers of general circulation as the judge may designate.

SEC. 162. At the hearing required by section 161 of this Act, or at any adjournment thereof, or, upon application, at any other time, the judge may hear objections to the continuance of the debtor in possession, or to the retention in office of a trustee upon the ground that he is not qualified or not disinterested as provided in section 158 of this Act.

SEC. 163. Upon the approval of a petition, where the debtor is continued in possession, the debtor shall, at the expense of the estate, prepare, make oath to, and file in court, within such time as the court shall fix—

(1) a schedule of its property, showing the location, quantity, and money value thereof;

(2) a schedule of its creditors of each class, showing the amounts and character of their claims and securities and, so far as known, the name and post-office address or place of business of each creditor; and

(3) a schedule of its stockholders of each class showing the number and kind of shares registered in the name of each stockholder, and the last-known post-office address or place of business of each stockholder.

SEC. 164. Upon the approval of a petition, where a debtor is not continued in possession, the court shall fix a time within which the trustee shall prepare and file in court a list of the creditors of each class, showing the amounts and character of their claims and securities and, so far as known, the name and the post-office address or place of business of each creditor; and a list of the debtor's stockholders of each class, showing the number and kind of shares registered in the name of each stockholder and the last-known post-office address or place of business of each stockholder.

SEC. 165. If in any case it appears that a person, other than the debtor or its trustee, has in his possession or under his control a list of security holders of the debtor or information in respect to their names, addresses, or the securities held by any of them, and such list or information is necessary in order to disclose the names and addresses of the beneficial owners of such securities, or to prepare or complete the schedules required to be filed under section 163 of this Act or the lists required to be filed under section 164 of this Act, the court shall direct such person, after a hear-

ing upon notice to him, to produce such list or a true and correct copy thereof, or to furnish such information, or to permit the inspection or use thereof, as may be deemed by the court necessary for the foregoing purposes.

SEC. 166. The court may, upon cause shown, direct the impounding of the schedules, lists, copies, or information filed under sections 163, 164, and 165 of this Act, but shall permit their inspection or use by the trustee, any indenture trustee or any creditor or stockholder upon such terms as the court may prescribe: *Provided*, That the court may refuse to permit such inspection by any creditor or stockholder who acquired his claim or stock within three months preceding the filing of the petition under this chapter or during the pendency of the proceeding.

SEC. 167. The trustee upon his appointment and qualification—

(1) shall, if the judge shall so direct, forthwith investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the proceeding or to the formulation of a plan, and report thereon to the judge;

(2) may, if the judge shall so direct, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters or any of them;

(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate;

(4) may, subject to the approval of the judge, employ such person or persons as the judge may deem necessary for the purpose of assisting the trustee in performing the duties imposed upon him under this chapter;

(5) shall, at the earliest date practicable, prepare and submit a brief statement of his investigation of the property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, in such form and manner as the judge may direct, to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may designate; and

(6) shall give notice to the creditors and stockholders that they may submit to him suggestions for the formulation of a plan, or proposals in the form of plans, within a time therein named.

SEC. 168. If a debtor is continued in possession, the judge may at any time appoint a disinterested person as examiner to prepare and file a plan and to perform the duties imposed upon a trustee under paragraphs (1) to (5), inclusive, of section 167 of this Act, or to perform any of such duties.

SEC. 169. Where a trustee has been appointed the judge shall fix a time within which the trustee shall prepare and file a plan, or a report of his reasons why a plan cannot be effected, and shall fix a subsequent time for a hearing on such plan or report and for the consideration of any objections which may be made or of such amendments of plans as may be proposed by the debtor or by any creditor or stockholder.

SEC. 170. Where a debtor is continued in possession, a plan or plans may be filed, within a time fixed by the judge—

(1) by the debtor;

(2) by any creditor or indenture trustee;

(3) by any stockholder, if the debtor is not found to be insolvent;

(4) by the examiner, if so directed by the judge. The judge shall fix a subsequent time for a hearing on such plans and for the consideration of any objections or amendments thereto.

SEC. 171. Notice of the time of any hearing, as provided in section 169 or section 170 of this Act, shall be given to the debtor, the creditors and stockholders, the indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the court may designate. The judge may, upon the application of the trustee, any creditor, indenture trustee, or stockholder, advance the time of such hearing.

SEC. 172. After the hearing, as provided in section 169 or section 170 of this Act, and before the approval of any plan, as provided in section 174 of this Act, the judge may, if the scheduled indebtedness of the debtor does not exceed $3,000,000, and shall, if such indebtedness exceeds $3,000,000,

submit to the Securities and Exchange Commission for examination and report the plan or plans which the judge regards as worthy of consideration. Such report shall be advisory only.

SEC. 173. The judge shall not enter an order approving a plan submitted to the Securities and Exchange Commission until after the Securities and Exchange Commission has filed its report thereon or has notified the judge that it will not file a report, or until the expiration of such reasonable time for the filing of such report as the judge has fixed, whichever first occurs.

SEC. 174. After the hearing, as provided in section 169 or section 170 of this Act, and, if a plan has been submitted to the Securities and Exchange Commission, as provided in section 172 of this Act, then after the filing of the report or notice that it will not be filed, or after the expiration of the time for its filing, whichever first occurs, the judge shall enter an order approving the plan or plans which in his opinion comply with the provisions of section 216 of this Act, and which are fair and equitable, and feasible, and shall fix a time within which the creditors and stockholders affected thereby may accept the same.

SEC. 175. Upon the approval of a plan by the judge, the trustee or the debtor in possession shall transmit, by mail or otherwise, to all creditors and stockholders who are affected by any such plan—

(1) the plan or plans so approved, together with a summary thereof approved by the judge;

(2) the opinion of the judge, if any, approving the plan, or plans, or a summary thereof approved by the judge;

(3) the report, if any, filed in the proceeding by the Securities and Exchange Commission, as provided in section 172 of this Act, or a summary thereof prepared by the Securities and Exchange Commission; and

(4) such other matters as the judge may deem necessary or desirable for the information of creditors and stockholders.

SEC. 176. No person shall, without the consent of the court, solicit any acceptance, conditional or unconditional, of any plan, or any authority, conditional or unconditional, to accept

any plan, whether by proxy, deposit, power of attorney or otherwise, until after the entry of an order approving such plan and the transmittal thereof to the creditors and stockholders, as provided in section 175 of this Act; and any such authority or acceptance given, procured, or received by reason of a solicitation prior to such approval and transmittal shall be invalid, unless such consent of the court has been so obtained.

SEC. 177. In case a debtor is a public-utility corporation, subject to the jurisdiction of a commission having regulatory jurisdiction over the debtor, a plan shall not be approved, as provided in section 174 of this Act, until—

(1) it shall have been submitted to each such commission;

(2) an opportunity shall have been afforded each such commission to suggest amendments or offer objections to the plan; and

(3) the judge shall have considered such amendments or objections at a hearing at which such commission may be heard.

SEC. 178. In case a debtor is a public utility corporation, wholly intrastate, subject to the jurisdiction of a State commission having regulatory jurisdiction over such debtor, a plan shall not be approved, as provided in section 174 of this Act, unless such State commission shall have first certified its approval of such plan as to the public interest therein and the fairness thereof. Upon its failure to certify its approval or disapproval within thirty days, or such further time as the court may prescribe, after the submission of the plan to it, as provided in section 177 of this Act, the public interest shall, for the purposes of such approval and of the confirmation of the plan, not be deemed to be affected by the plan.

SEC. 179. After a plan has been accepted in writing, filed in court, by or on behalf of creditors holding two-thirds in amount of the claims filed and allowed of each class, and, if the debtor has not been found to be insolvent, by or on behalf of stockholders holding the majority of stock, of which proofs have been filed and allowed, of each class, exclusive of creditors or stockholders or of any class of them who are not affected by the plan or whose claims or stock are dis-

qualified pursuant to section 203 of this Act, or for whom payment or protection has been provided as prescribed in paragraphs (7) and (8) of section 216 of this Act, the judge shall fix a hearing, upon notice to the debtor, creditors, stockholders, indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the judge may designate, for the consideration of the confirmation of the plan and of such objections as may be made to the confirmation.

SEC. 180. The order of the judge approving a plan, as provided in section 174 of this Act, shall not affect the right of the debtor, a creditor, indenture trustee, or stockholder to object to the confirmation of the plan.

ARTICLE VIII—TITLE, RIGHTS, AND POWERS OF TRUSTEES AND DEBTORS IN POSSESSION

(11 U.S.C. §§ 586–591.)

SEC. 186. A trustee, upon his appointment and qualification, shall be vested with such title as a trustee appointed under section 44 of this Act would have.

SEC. 187. Where not inconsistent with the provisions of this chapter, a trustee, upon his appointment and qualification, shall be vested with the same rights, be subject to the same duties, and exercise the same powers as a trustee appointed under section 44 of this Act, and, if authorized by the judge, shall have and may exercise such additional rights and powers as a receiver in equity would have if appointed by a court of the United States for the property of the debtor.

SEC. 188. A debtor continued in possession of its property shall have all the title, be vested with all the rights, be subject to all the duties, and exercise all the powers of a trustee appointed under this chapter, subject, however, at all times to the control of the judge and to such limitations, restrictions, terms, and conditions as the judge may from time to time prescribe.

SEC. 189. A trustee or debtor in possession, upon authorization by the judge, shall operate the business and manage the property of the debtor during such period, limited or

indefinite, as the judge may from time to time fix, and during such operation or management shall file reports thereof with the court at such intervals as the court may designate.

SEC. 190. The reports of the trustee or debtor in possession shall be in such form and contain such information as the court may prescribe and shall at all times be open to the examination of any party in interest. The court shall direct copies or summaries of annual reports, and may direct copies or summaries of other reports, to be mailed to the creditors, stockholders, and indenture trustees, and may also direct the publication of summaries of any such reports in such newspaper or newspapers of general circulation as the court may designate. The Securities and Exchange Commission may recommend the form of such reports and summaries.

SEC. 191. A trustee or debtor in possession may employ officers of the debtor at rates of compensation to be approved by the court. No person shall become an officer or director of the debtor, to fill a vacancy or otherwise, without the prior approval of the court.

ARTICLE IX—CREDITORS AND STOCKHOLDERS.

(11 U.S.C. §§ 596–612.)

SEC. 196. After the approval of the petition the judge shall prescribe the manner in which and fix a time within which the proofs of claim of creditors and of the interests of stockholders may be filed and allowed. Objections by any party in interest to the allowance of any such claims or interests shall be heard and summarily determined by the court.

SEC. 197. For the purposes of the plan and its acceptance, the judge shall fix the division of creditors and stockholders into classes according to the nature of their respective claims and stock. For the purposes of such classification, the judge shall, if necessary, upon the application of the trustee, the debtor, any creditor, or an indenture trustee, fix a hearing upon notice to the holders of secured claims, the debtor, the trustee, and such other persons as the judge may designate, to determine summarily the value of the security and classify as unsecured the amount in excess of such value.

SEC. 198. An indenture trustee may file claims for all

holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee, who have not filed claims: *Provided, however,* That in computing the majority necessary for the acceptance of the plan only the claims filed by the holders thereof, and allowed, shall be included.

SEC. 199. If the United States is a secured or unsecured creditor or stockholder of a debtor, the claims or stock thereof shall be deemed to be affected by a plan under this chapter, and the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the claims or stock of the United States. If, in any proceeding under this chapter, the United States is a secured or unsecured creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against the debtor, as secured or unsecured creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury certified to the court: *Provided,* That if the Secretary of the Treasury shall fail to accept or reject a plan for more than ninety days after receipt of written notice so to do from the court to which the plan has been proposed, accompanied by a certified copy of the plan, his consent shall be conclusively presumed.

SEC. 200. Where not inconsistent with the provisions of this chapter, the rights, duties, and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same, before the approval of the petition, as in a bankruptcy proceeding before adjudication and, upon the approval of the petition, as in a bankruptcy proceeding upon adjudication.

SEC. 201. All claims arising after the filing of a petition under this chapter and before the qualification of a receiver or trustee or before the petition is approved and the debtor continued in possession, whichever first occurs, shall be provable.

SEC. 202. In case an executory contract shall be rejected pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity in a prior pending proceeding,

any person injured by such rejection shall, for the purposes of this chapter and of the plan, its acceptance and confirmation, be deemed a creditor. The claim of the landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be provable, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by such lease for the three years next succeeding the date of the surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid accrued rent, without acceleration, up to such date of surrender or reentry: *Provided*, That the court shall scrutinize the circumstances of an assignment of a future rent claim and the amount of the consideration paid for such assignment in determining the amount of damages allowed the assignee thereof.

SEC. 203. If the acceptance or failure to accept a plan by the holder of any claim or stock is not in good faith, in the light of or irrespective of the time of acquisition thereof, the judge may, after hearing upon notice, direct that such claim or stock be disqualified for the purpose of determining the requisite majority for the acceptance of a plan.

SEC. 204. Upon distribution, as provided in section 224 of this Act, the judge may, upon notice to all persons affected, fix a time, to expire not sooner than five years after the final decree closing the estate, within which, as provided in the plan or final decree—

(1) the creditors, other than holders of securities, shall file, assign, transfer, or release their claims; and

(2) the holders of securities shall present or surrender their securities. After such time no such claim or stock shall participate in the distribution under the plan.

SEC. 205. The securities or cash remaining unclaimed at the expiration of the time fixed as provided in section 204 of this Act, or of any extension thereof, shall become the property of the debtor or of the new corporation acquiring the assets of the debtor under the plan, as the case may be, free and clear of any and all claims and interests.

SEC. 206. The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees.

SEC. 207. The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter. Except where otherwise provided in this chapter, the judge may from time to time enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notice shall be given.

SEC. 208. The Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file a notice of its appearance in a proceeding under this chapter. Upon the filing of such a notice, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding, and shall be deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge; but the Commission may not appeal or file any petition for appeal in any such proceeding.

SEC. 209. Any creditor or stockholder may in a proceeding under this chapter act in person, by an attorney at law, or by duly authorized agent or committee.

SEC. 210. An attorney for creditors or stockholders shall not be heard unless he has first filed with the court a statement setting forth the names and addresses of such creditors or stockholders, the nature and amounts of their claims or stock, and the time of acquisition thereof, except as to claims or stock alleged to have been acquired more than one year prior to the filing of the petition.

SEC. 211. Every person or committee, representing more than twelve creditors or stockholders, and every indenture trustee, who appears in the proceeding shall file with the court a statement, under oath, which shall include—

(1) a copy of the instrument, if any, whereby such person,

committee, or indenture trustee is empowered to act on behalf of creditors or stockholders;

(2) a recital of the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or formed or agreed to act;

(3) with reference to the time of the employment of such person, or the organization or formation of such committee, or the appearance in the proceeding of any indenture trustee, a showing of the amounts of claims or stock owned by such person, the members of such committee or such indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof; and

(4) a showing of the claims or stock represented by such person or committee and the respective amounts thereof, with an averment that each holder of such claims or stock acquired them at least one year before the filing of the petition or with a showing of the times of acquisition thereof.

SEC. 212. The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contemplation or in the course of the proceeding under this chapter to the actual consideration paid therefor.

SEC. 213. Without limiting the powers of the judge under section 212 of this Act, an agent, indenture trustee, or committee, purporting to represent creditors or stockholders, shall not be heard or allowed to intervene in a proceeding under this chapter until such person or persons shall have satisfied the court that they have complied with all applicable laws regulating the activities and personnel of such persons.

ARTICLE X—PROVISIONS OF PLAN.

(11 U.S.C. § 616.)

SEC. 216. A plan of reorganization under this chapter—

(1) shall include in respect to creditors generally or some class of them, secured or unsecured, and may include in respect to stockholders generally or some class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise;

(2) may deal with all or any part of the property of the debtor;

(3) shall provide for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge;

(4) may provide for the rejection of any executory contract except contracts in the public authority;

(5) shall specify what claims, if any, are to be paid in cash in full;

(6) shall specify the creditors or stockholders or any class of them not to be affected by the plan and the provisions, if any, with respect to them;

(7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan, (a) by the transfer or sale, or by the retention by the debtor, of such property subject to such claims; or (b) by a sale of such property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such sale; or (c) by appraisal and payment in cash of the value of such claims; or (d) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection;

(8) shall provide for any class of stockholders which is affected by the plan and does not accept the plan by the majority of the stock required under this chapter, adequate protection for the realization by them of the value of their equity, if any, in the property of the debtor dealt with by

the plan, either as provided in the plan or in the order confirming the plan, (a) by the sale of such property at not less than a fair upset price; or (b) by appraisal and payment in cash of the value of their stock; or (c) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection: *Provided, however*, That such protection shall not be required if the judge shall determine that the debtor is insolvent;

(9) may include, where any indebtedness is created or extended under the plan for a period of more than five years, provisions for the retirement of such indebtedness by stated or determinable payments out of a sinking fund or otherwise, (a) if secured, within the expected useful life of the security thereof, or (b) if unsecured, or if the expected useful life of the security is not fairly ascertainable, then within a specified reasonable time, not to exceed forty years;

(10) shall provide adequate means for the execution of the plan, which may include: the retention by the debtor of all or any part of its property; the sale or transfer of all or any part of its property to one or more other corporations theretofore organized or thereafter to be organized; the merger or consolidation of the debtor with one or more other corporations; the sale of all or any part of its property, either subject to or free from any lien, at not less than a fair upset price and the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein; the satisfaction or modification of liens; the cancellation or modification of indentures or of other similar instruments; the curing or waiver of defaults; the extension of maturity dates and changes in interest rates and other terms of outstanding securities; the amendment of the charter of the debtor; the issuance of securities of the debtor or such other corporations for cash, for property, in exchange for existing securities, in satisfaction of claims or stock or for other appropriate purposes;

(11) shall include provisions which are equitable, compatible with the interests of creditors and stockholders, and consistent with public policy, with respect to the manner of selection of the persons who are to be directors, officers, or

voting trustees, if any, upon the consummation of the plan, and their respective successors;

(12) shall provide for the inclusion in the charter of the debtor, or any corporation organized or to be organized for the purpose of carrying out the plan of—

(a) provisions prohibiting the debtor or such corporation from issuing non-voting stock, and providing, as to the several classes of securities of the debtor or of such corporation possessing voting power, for the fair and equitable distribution of such power among such classes, including, in the case of any class of stock having a preference over other stock with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; and

(b) (1) provisions which are fair and equitable and in accordance with sound business and accounting practice, with respect to the terms, position, rights, and privileges of the several classes of securities of the debtor or of such corporation, including, without limiting the generality of the foregoing, provisions with respect to the issuance, acquisition, purchase, retirement or redemption of any such securities, and the declaration and payment of dividends thereon; and (2) in the case of a debtor whose indebtedness, liquidated as to amount and not contingent as to liability, is $250,000 or over, provisions with respect to the making, not less than once annually, of periodic reports to security holders which shall include profit and loss statements and balance sheets prepared in accordance with sound business and accounting practice;

(13) may include provisions for the settlement or adjustment of claims belonging to the debtor or to the estate; and shall provide, as to such claims not settled or adjusted in the plan, for their retention and enforcement by the trustee or, if the debtor has been continued in possession, by an examiner appointed for that purpose; and

(14) may include any other appropriate provisions not inconsistent with the provisions of this chapter.

ARTICLE XI—CONFIRMATION AND CONSUMMATION OF PLAN.

(11 U.S.C. §§ 621-629.)

SEC. 221. The judge shall confirm a plan if satisfied that—

(1) the provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such offices, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy.

SEC. 222. A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

SEC. 223. Any creditor or stockholder who has previously accepted the plan proposed to be altered or modified and who does not file a written rejection of the proposed alteration or modification within the time fixed by the judge, shall be deemed to have accepted the alteration or modification and the plan so altered or modified unless the previous acceptance provides otherwise.

SEC. 224. Upon confirmation of a plan—

(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

(2) the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation;

(3) if the judge shall so direct, there shall be deposited and distributed, in such manner as the judge may direct, the moneys for all payments which by the provisions of the plan or under this chapter are required to be made in cash; and

(4) distribution shall be made, in accordance with the provisions of the plan, to creditors and stockholders (a) proofs of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not so filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession and are not contingent, unliquidated or disputed.

SEC. 225. Where the claims or stock specified in paragraph (4), clause (b), of section 224 of this Act are objected to by any party in interest, the objection shall be heard and summarily determined by the court.

SEC. 226. The property dealt with by the plan, when trans-

ferred by the trustee to the debtor or other corporation or corporations provided for by the plan, or when transferred by the debtor in possession to such other corporation or corporations, or when retained by the debtor in possession, as the case may be, shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of such property.

SEC. 227. The court may direct the debtor, its trustees, any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of property dealt with by a plan which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the plan.

SEC. 228. Upon the consummation of the plan, the judge shall enter a final decree—

(1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

(2) discharging the trustee, if any;

(3) making such provisions by way of injunction or otherwise as may be equitable; and

(4) closing the estate.

Sec. 229. a. A plan shall be deemed to have been substantially consummated if, insofar as applicable, each of the following events has occurred:

(1) transfer, sale or other disposition of all or substantially all of the property dealt with by the plan pursuant to the provisions of the plan;

(2) assumption of operation of the business and management of all or substantially all of the property dealt with by the plan by the debtor or by the corporation used for the purpose of carrying out the plan; and

(3) commencement of the distribution to creditors and

stockholders, affected by the plan, of the cash and securities specified in the plan as provided for in section 224 of this Act.

b. Upon notice to the trustee, the debtor, the Securities and Exchange Commission and such other persons as the judge may designate, the trustee, the debtor in possession, the corporation to which the assets of the debtor are to be transferred under the plan, or any other party in interest may apply to the judge for an order declaring the plan to have been substantially consummated under the provisions of subdivision a of this section.

c. When a plan has been substantially consummated as defined in subdivision a of this section, or an order has been entered under subdivision b of this section, the plan may not thereafter be altered or modified if the proposed alteration or modification materially and adversely affects the participation provided for any class of creditors or stockholders by the plan.

Article XII—Dismissals and Adjudications.
(11 U.S.C. §§ 636-638.)

Sec. 236. If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall—

(1) where the petition was filed under section 127 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the petition was filed under section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders.

SEC. 237. Upon the dismissal of a proceeding under this chapter, where the petition was filed under section 128 of this Act, the judge shall enter a final decree discharging the trustee, if any, and closing the estate, except as otherwise provided by section 259 of this Act.

SEC. 238. a. Upon the entry of an order directing that bankruptcy be proceeded with—

(1) where the petition was filed under section 127 of this Act, the bankruptcy proceeding shall be deemed reinstated and shall thereafter be conducted, so far as possible, as if the petition under this chapter had not been filed; or where the petition was filed under section 128 of this Act, the proceeding shall thereafter be conducted so far as possible, in the same manner and with like effect as if an involuntary petition for adjudication had been filed at the time when the petition under this chapter was filed, and a decree of adjudication had been entered at the time when the petition under this chapter was approved;

(2) a trustee shall be elected or appointed pursuant to section 44 of this Act and shall supersede any trustee previously appointed;

(3) a separate schedule listing unpaid obligations incurred after the filing of the petition under this chapter, including the amounts owing, the creditors' names, and their addresses or places of business, and a statement of all contracts, executory in whole or in part, assumed or entered into after the filing of the petition, shall be filed with the court within thirty days after the entry of such order or within such further time as the court may allow; such schedule and statement shall be filed by the debtor for any obligations incurred and contracts assumed or entered into by it while continued in possession and before the qualification of a receiver or trustee, if any, under this chapter, and if a receiver or trustee has qualified, the schedule and statement shall be filed by such receiver or trustee for any obligations incurred and contracts assumed or entered into by him; and

(4) except as otherwise provided in this section, only claims for taxes due and in the United States or any State or any subdivision thereof at the time of filing of the original petition under this Act and such claims as are provable under section

63 of this Act shall be allowed; and, as to any such claims not already duly filed, where the petition was filed under section 127 of this Act and an order setting the first date for the first meeting of creditors was made before the filing of such petition, the date of mailing of notice to creditors of the entry of the order directing that bankruptcy be proceeded with shall, for the purposes of subdivision n of section 57 of this Act, be deemed to be the first date set for the first meeting of creditors; but if the time for filing claims in a pending bankruptcy proceeding had expired prior to the filing of a petition under this chapter, claims not filed within the time prescribed or as permitted by subdivision n of section 57 of this Act, shall not be allowed in the reinstated bankruptcy proceeding.

b. Any contract which is entered into or assumed by a debtor in possession, receiver, or trustee in a proceeding under this chapter and which is executory in whole or in part at the time of the entry of an order directing that bankruptcy be proceeded with shall be deemed to be rejected unless expressly assumed within sixty days after the entry of such order or the qualification of the trustee in bankruptcy, whichever is the later, but the court may for cause shown extend or reduce the time. When a contract entered into or assumed in a superseded proceeding is rejected, the resulting liability shall constitute a cost of administration of the superseded proceeding.

c. Upon the filing of the schedule and statement required by subdivision a of this section, the court shall make an order directing the claims against the debtor in possession, receiver, or trustee, including all claims of the United States, any State, or any subdivision thereof, to be filed, and the holders of such claims to be notified to file their claims within sixty days from the date of the order. The court shall designate the form and manner in which the notice shall be given. Notwithstanding the foregoing, claims not duly scheduled as provided in subdivision a of this section and claims arising from rejection of executory contracts under subdivision b of this section may be filed within such further time as the court may direct. Except as otherwise provided in this section, claims against the debtor in possession, receiver, or trustee shall be proved and filed in the manner provided in section 57 of this Act.

d. Claims directed to be filed under subdivision c of this section but not filed within the time therein provided shall not be allowed and shall be barred, and the debtor in possession, receiver, or trustee shall be forever discharged from any liability with respect to such claims. When all claims which have been duly allowed have been paid in full, claims directed to be filed but not filed within the time prescribed pursuant to subdivision c and claims not allowable under paragraph (4) of subdivision a of this section because not filed within the time prescribed therein may nevertheless be filed within such time as the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case.

ARTICLE XIII—COMPENSATION AND ALLOWANCES.

(11 U.S.C. §§ 641-650.)

SEC. 241. The judge may allow reimbursement for proper costs and expenses incurred by the petitioning creditors and reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in a proceeding under this chapter—

(1) by a referee;

(2) by a special master;

(3) by the trustee and other officers, and the attorneys for any of them;

(4) by the attorney for the debtor; and

(5) by the attorney for the petitioning creditors.

Such compensation of referees and trustees shall not be governed by sections 40 and 48 of this Act.

SEC. 242. The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

(2) by any other parties in interest except the Securities and Exchange Commission; and

(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission.

SEC. 243. The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto.

SEC. 244. Where a petition is filed under section 127 of this Act, the judge may allow, if not already allowed, reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in the pending bankruptcy proceeding—

(1) by a marshal, receiver, or trustee, as provided in subdivision g of section 48 of this Act, and the attorneys for any of them;

(2) by the attorney for the petitioning creditors;

(3) by the attorney for the bankrupt; and

(4) by any other persons and the attorneys for any of them entitled under this Act to compensation or reimbursement in such bankruptcy proceeding.

SEC. 245. Where a petition is filed in a pending bankruptcy proceeding, the judge may allow reasonable compensation for services rendered and the proper costs and expenses incurred in such bankruptcy proceeding by a referee in bankruptcy. In fixing such compensation, the judge shall not be restricted by the provisions of section 40 of this Act.

SEC. 246. Upon the dismissal of a proceeding under this chapter, or the entry of an order adjudging the debtor a bankrupt, the judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in such proceeding prior to such dismissal

or order of adjudication by any persons entitled thereto, as provided in this chapter, and shall make provision for the payment thereof, and for the payment of all proper costs and expenses incurred by officers in such proceedings.

SEC. 247. The judge shall fix a time of hearing for the consideration of applications for allowances, of which hearing notice shall be given to the applicants, the trustee, the debtor, the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may designate, except that notice need not be given to any class of creditors or stockholders which does not participate under the plan as confirmed by the court from which no appeal is pending and the time allowed for appeal has expired. In the case of allowances for services and reimbursement in a superseded bankruptcy proceeding, notice need be given only to the applicants, the debtor, the trustee, and the unsecured creditors, and may be given to such other classes of creditors or other persons as the judge may designate. In the case of the dismissal of a proceeding under this chapter and the entry of an order therein directing that bankruptcy be proceeded with, notice of the hearing to consider allowances need not be given to stockholders.

SEC. 248. In the case of the dismissal of a proceeding under this chapter and the entry of an order therein directing that a superseded bankruptcy be proceeded with, the compensation allowed by the judge, in the course of the proceeding under this chapter, to the referee, marshal, receiver, or trustee in the bankruptcy proceeding for services rendered by them in such bankruptcy proceeding shall be deemed to have been allowed in such bankruptcy proceeding, and such compensation shall be considered in connection with the making of future allowances therein or shall be readjusted, so as to comply with the provisions of this Act fixing their compensation in a bankruptcy proceeding.

SEC. 249. Any persons seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for

his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred.

SEC. 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers.

ARTICLE XIV—PRIOR PROCEEDINGS.

(11 U.S.C. §§ 656-659.)

SEC. 256. A petition may be filed under this chapter notwithstanding the pendency of a prior mortgage foreclosure, equity, or other proceeding in a court of the United States or of any State in which a receiver or trustee of all or any part of the property of a debtor has been appointed or for whose appointment an application has been made.

SEC. 257. The trustee appointed under this chapter, upon his qualification, or if a debtor is continued in possession. the debtor, shall become vested with the rights, if any, of such prior receiver or trustee in such property and with the right to the immediate possession thereof. The trustee or debtor in possession shall also have the right to immediate possession of all property of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage.

SEC. 258. The judge shall make such provision as may be equitable for the protection of the obligations incurred by a receiver or trustee in such prior proceeding and for the payment of the reasonable costs and expenses incurred therein as may be allowed by the judge.

SEC. 259. Upon a dismissal of a proceeding under this

chapter, such prior proceeding shall become reinstated, and the judge shall allow the reasonable costs and expenses under this chapter, including the allowances provided for in article XIII of this chapter, and shall make appropriate provision for the retransfer of such property to the person or persons entitled thereto upon such terms as may be equitable for the protection of the obligations incurred in the proceedings under this chapter by the trustee or debtor in possession, and for the payment of the costs and expenses of the proceedings.

ARTICLE XV—GENERAL PROVISIONS.

(11 U.S.C. §§ 661–672.)

SEC. 261. All statutes of limitation affecting claims and interests provable under this chapter and the running of all periods of time prescribed by this Act in respect to the commission of acts of bankruptcy, the recovery of preferences, and the avoidance of liens and transfers shall be suspended while a proceeding under this chapter is pending and until it is finally dismissed.

SEC. 262. If a proceeding under this chapter shall be dismissed, the filing of the petition shall not constitute an act of bankruptcy by the debtor.

SEC. 263. Nothing contained in this chapter shall be deemed to affect or apply to the creditors of any corporation under a mortgage insured pursuant to the National Housing Act and Acts amendatory thereof and supplementary thereto.

SEC. 264. a. The provisions of section 5 of the Securities Act of 1933 shall not apply to—

(1) any security issued by the receiver, trustee, or debtor in possession pursuant to paragraph (2) of section 116 of this Act; or

(2) Any transaction in any security issued pursuant to a plan in exchange for securities of or claims against the debtor or partly in such exchange and partly for cash and/or property, or issued upon exercise of any right to subscribe or conversion privilege so issued, except (a) transactions by an issuer or an underwriter in connection with a distribution otherwise than pursuant to the plan, and (b) transactions by

a dealer as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in a distribution of such securities by the issuer or by or through an underwriter otherwise than pursuant to the plan.

b. As used in this section, the terms "security", "issuer", "underwriter", and "dealer" shall have the meanings provided in section 2 of the Securities Act of 1933, and the term "Securities Act of 1933" shall be deemed to refer to such Act as heretofore or hereafter amended.

SEC. 265. a. In addition to the notices elsewhere expressly provided, the Securities and Exchange Commission shall be given notice of all other steps taken in connection with a proceeding under this chapter. Any notice which this chapter requires to be given to the Securities and Exchange Commission shall be deemed to have been sufficiently given if it is given by registered first-class mail, postage prepaid, addressed to the Securities and Exchange Commission at Washington, District of Columbia, or at such other place as the Securities and Exchange Commission shall designate by written notice filed in the proceeding and served upon the parties thereto. The clerk and, in the case of a reference, the referee after such reference, shall forthwith transmit to the Securities and Exchange Commission copies of (1) every petition filed under this chapter; (2) the answers thereto, if any; (3) the orders approving or dismissing petitions; (4) the orders appointing trustees or continuing debtors in possession; (5) the orders determining the time within which the claims of creditors may be filed and allowed, and the division of creditors and stockholders into classes according to the nature of their respective claims and stock; (6) copies of plans, alterations or modications in plans, and any notices of hearings on the plans, alterations, or modifications; (7) the orders approving any plan or plans or alterations or modifications in plans; (8) the orders confirming plans, together with copies of such plans; (9) all applications for allowances for compensation and expenses, and the orders making or refusing to make such allowances; (10) the orders adjudging debtors to be solvent or insolvent; (11) the orders directing that bankruptcy be proceeded with, or adjudging the debtors bankrupt and directing that bankruptcy be proceeded with, or dismissing proceedings;

(12) and such other papers filed in the proceedings as the Securities and Exchange Commission may request or which the court may direct be transmitted to it. Copies of the opinions or reports, if any, of the judge, referee, or special master, with respect to the matters enumerated, shall also be transmitted to the Securities and Exchange Commission.

b. The provisions of section 4 (b) of the Securities Exchange Act of 1934 shall be applicable with respect to the power of the Securities and Exchange Commission to appoint and fix the compensation of such officers, attorneys, examiners, and other experts, and such other officers and employees, as may be necessary for carrying out its functions under this chapter.

SEC. 266. In addition to the notices elsewhere expressly provided, the clerk and, in the case of a reference, the referee, after such reference, shall forthwith transmit to the Secretary of the Treasury copies of all petitions, answers, orders, and applications, as more specifically enumerated in section 265 of this Act, and copies of such other papers filed in the proceedings as the Secretary of the Treasury may request or which the court may direct be transmitted to him. Copies of the opinions or reports, if any, of the judge, referee, or special master, with respect to the matters so enumerated, shall also be transmitted to the Secretary of the Treasury. Any order fixing the time for confirming a plan which affects claims or stock of the United States shall include a notice to the Secretary of the Treasury of not less than thirty days.

SEC. 267. The issuance, transfer, or exchange of securities, or the making or delivery of instruments of transfer under any plan confirmed under this chapter, shall be exempt from any stamp taxes now or hereafter imposed under the laws of the United States or of any State.

SEC. 268. Except as provided in section 270 of this Act, no income or profit, taxable under any law of the United States or of any State now in force or which may hereafter be enacted, shall, in respect to the adjustment of the indebtedness of a debtor in a proceeding under this chapter, be deemed to have accrued to or to have been realized by a debtor, by a trustee provided for in a plan under this chapter, or by a corporation organized or made use of for effectuating a

plan under this chapter by reason of a modification in or cancellation in whole or in part of any of the indebtedness of the debtor in a proceeding under this chapter.

SEC. 269. Where it appears that a plan has for one of its principal purposes the avoidance of taxes, objection to its confirmation may be made on that ground by the Secretary of the Treasury, or, in the case of a State, by the corresponding official or other person so authorized. Such objections shall be heard and determined by the judge, independently of other objections which may be made to the confirmation of the plan, and, if the judge shall be satisfied that such purpose exists, he shall refuse to confirm the plan.

SEC. 270. In determining the basis of property for any purposes of any law of the United States or of a State imposing a tax upon income, the basis of the debtor's property (other than money) or of such property (other than money) as is transferred to any person required to use the debtor's basis in whole or in part shall be decreased by an amount equal to the amount by which the indebtedness of the debtor, not including accrued interest unpaid and not resulting in a tax benefit on any income tax return, has been cancelled or reduced in a proceeding under this chapter, but the basis of any particular property shall not be decreased to an amount less than the fair market value of such property as of the date of entry of the order confirming the plan. Any determination of value in a proceeding under this chapter shall not be deemed a determination of fair market value for the purposes of this section. The commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe such regulations as he may deem necessary in order to reflect such decrease in basis for Federal income-tax purposes and otherwise carry into effect the purposes of this section.

SEC. 271. Any provision in this chapter to the contrary notwithstanding, all taxes which may be found to be owing to the United States or any State from a debtor within one year from the date of the filing of a petition under this chapter and have not been assessed prior to the date of the confirmation of a plan under this chapter, and all taxes which may become owing to the United States or any State from a

receiver or trustee of a debtor or from a debtor in possession, shall be assessed against, may be collected from and shall be paid by the debtor or the corporation organized or made use of for effectuating a plan under this chapter: *Provided, however,* That the United States or any State may in writing accept the provisions of any plan dealing with the assumption, settlement, or payment of any such tax.

SEC. 272. The right of employees or of persons seeking employment on the property of a debtor under the jurisdiction of the court to join a labor organization of their choice, or to refuse to join or remain members of a company union, shall be free from interference, restraint, or coercion by the court, a debtor, or trustee. It shall be the duty of a debtor or trustee to report to the judge any agreement restricting or interfering with such right, and the judge shall thereupon enter an appropriate order for the termination of such agreement and for notice to the employees that the same is no longer binding upon them. No funds of the estate shall be used by a debtor or a trustee for the purpose of maintaining company unions.

ARTICLE XVI—WHEN CHAPTER TAKES EFFECT.

(11 U.S.C. § 676.)

SEC. 276. a. This chapter shall apply to debtors by whom or against whom petitions are filed on and after the effective date of this amendatory Act and to the creditors and stockholders thereof, whether their rights, claims, or interests of any nature whatsoever have been acquired or created before or after such date;

b. a petition may be filed under this chapter in a proceeding in bankruptcy which is pending on such date, and a petition may be filed under this chapter notwithstanding the pendency on such date of a proceeding in which a receiver or trustee of all or any part of the property of a debtor has been appointed or for whose appointment application has been made in a court of the United States or of any State;

c. the provisions of sections 77A and 77B of chapter VIII, as amended, of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," ap-

proved July 1, 1898, shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act, except that—

(1) if the petition in such proceedings was approved within three months prior to the effective date of this amendatory Act, the provisions of this chapter shall apply in their entirety to such proceedings; and

(2) if the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable; and

(3) sections 268 and 270 of this Act shall apply to any plan confirmed under section 77B before the effective date of this amendatory Act and to any plan which may be confirmed under section 77B on and after such effective date, except that the exemption provided by section 268 of this Act may be disallowed if it shall be made to appear that any such plan had for one of its principal purposes the avoidance of income taxes, and except further that where such plan has not been confirmed on and after such effective date, section 269 of this Act shall apply where practicable and expedient

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1112

JAMES H. PRICE, PETITIONER

v.

STACEY W. COTTON, TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION [1]

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[1] The Securities and Exchange Commission has been participating in this reorganization proceeding in the district court as a party pursuant to Section 208 of Chapter X of the Bankruptcy Act, as added, 11 U.S.C. 608, since shortly after the proceeding commenced in 1971. It has taken positions in that court and in the court of appeals similar to the positions urged herein. As in *Protective Committee* v. *Anderson*, 390 U.S. 414, 420 n. 3, and *Caplin* v. *Marine Midland Grace Trust Co.*, 406 U.S. 416, 419 n. 8, the Commission is "an unnamed respondent before this Court." See Rule 21 (4) of the Rules of this Court.

OPINIONS BELOW

The order of the court of appeals affirming *per curiam* the order of confirmation of the district court (Pet. App. A-1) is reported at 505 F. 2d 732. The order of the district court (Pet. App. A-3) and the report of the bankruptcy judge sitting as special master (Pet. App. A-11) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-2) was entered on December 6, 1974. The petition for a writ of certiorari was filed on March 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a plan of corporate reorganization under Chapter X of the Bankruptcy Act may be confirmed, although rejected by the debtor's shareholders, when the plan provides that the shareholders may choose to receive cash in excess of the value of their shares as found by the court.

STATUTE INVOLVED

The provisions of Chapter X of the Bankruptcy Act that are relevant to the question presented are Sections 179 and 216(8), as added, 55 Stat. 892 and 896, 11 U.S.C. 579 and 616(8). These provisions are set forth at Pet. App. A-59 and A-66.

STATEMENT

Atlanta International Raceway, Inc. ("debtor") filed a voluntary petition for reorganization under Chapter X of the Bankruptcy Act on January 18, 1971. The debtor had outstanding an eight percent mortgage note of $1,000,000 plus accrued interest, other debt in the aggregate amount of $426,521, and 320,254 shares of common stock held by over a thousand persons (App. 6-7).[2]

After a hearing, the debtor was found to be solvent with a reorganization value for its stock of about $1.00 per share. A proposed reorganization plan was found to be "fair, equitable and feasible" (Pet. App. A-14) and was approved, pursuant to Section 174 of the Act, 11 U.S.C. 574. The plan provided that the mortgage debt would be partially paid off and the remainder would be assumed, at a nine percent interest rate, by the reorganized debtor. Junior lien creditors would have the option of receiving a new junior note or new shares of the reorganized debtor's stock. Unsecured creditors would receive new shares in satisfaction of their claims. New shares would also be issued for cash to the sponsors of the plan. The existing stockholders were to retain their shares, which would represent approximately 18 to 26 percent of the shares outstanding upon completion of the reorganization.

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[2] "App." refers to the joint appendix filed in the United States Court of Appeals for the Fifth Circuit.

The plan was then submitted to creditors and stockholders, pursuant to Section 175 of the Act, 11 U.S.C. 575. The several classes of creditors accepted the plan, but the stockholders rejected it. The sponsors of the plan thereupon filed a proposal for the protection of dissenting stockholders, pursuant to Sections 179 and 216(8) of the Act, whereby all shareholders who chose to do so would receive $1.60 in cash for their shares from the sponsors (Pet. App. A-42).

The district judge confirmed the plan as amended, adopting the report of the bankruptcy judge, finding that it "provides more than 'adequate protection' pursuant to Section 216(8)" for the dissenting stockholders (Pet. App. A-42) and that the plan with "the adequate protection provided for the dissenting shareholder class [3] is fair, equitable and feasible and that it should be * * * confirm[ed]" (Pet. App. A-9, A-11, A-44).

Petitioner, a shareholder who acquired his shares after the Chapter X proceedings had begun, and who was a co-sponsor of a competing plan, appealed. He did not challenge the adequacy of the $1.60 per share option given to the shareholders, but contended solely that the stockholder protection provisions of Section 216(8) of Chapter X are inapplicable where a debtor has only one class of stockholders and a majority of that class rejects the plan. The court of appeals affirmed without opinion (Pet. App. A-1).

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[3] Confirmation was subject to a provision that any stockholder could also purchase shares at $1.60 up to an amount equal to that already held by him (Pet. App. A-42).

ARGUMENT

The decision below is in accord with established principles and does not present any issue warranting review by this Court.

Chapter X of the Bankruptcy Act is designed to provide court-supervised relief for financially troubled corporations. The primary goal of a Chapter X proceeding is to afford an opportunity for rehabilitation rather than liquidation by preserving the going-concern value of the debtor while allowing an opportunity for development of a plan for reorganization of the debtor's financial structure.

Section 216 of the Act sets forth both mandatory and optional provisions regarding reorganization plans. Section 216(1) provides that a plan "may include in respect to stockholders generally or some class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise." If a plan is found to conform to the requirements of the Act, it is then submitted to creditors and, if the debtor is solvent, to stockholders, for approval. See Section 179 of the Act.

If the stockholders reject the plan, Section 216(8) of the Act provides that a plan "shall provide for any class of stockholders which is affected by the plan and does not accept the plan by the majority of the stock required under this chapter, adequate protection for the realization by them of the value of their equity, if any, in the property of the debtor dealt with

by the plan, either as provided in the plan or in the order confirming the plan, * * * (b) by appraisal and payment in cash of the value of their stock * * *." [4]

Petitioner's sole contention in this Court, as in the courts below, is that Section 216(8) does not apply where a debtor has only one class of stockholders and a majority of that class rejects the plan. This contention is contrary to both the purpose and statutory scheme of Chapter X of the Act.

There are apparently no reported decisions specifically holding that Section 216(8) can be utilized when a majority of the single class of shareholders fails to accept a plan. The reason probably is that it has always been assumed that Section 216(8) can be so utilized. The correctness of this conclusion is shown by other provisions of Chapter X relating to confirmation of plans, and by case law construing these provisions with respect to dissenting creditors.

Although Section 179 requires acceptance of a plan by two-thirds of each class of creditors and, if the debtor is solvent, by a majority of each class of stockholders, that section excludes from the required majorities, creditors or stockholders "* * * for whom payment or protection has been provided as pre-

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[4] A comparable provision relating to creditors not accepting the plan appears in Section 216(7) of the Act. Such provisions, which are designed to avoid frustration of reorganizations while providing protection for dissenting shareholders or creditors, are often referred to as "cram-down" provisions and are a common feature of reorganization statutes. See the *Regional Rail Reorganization Act Cases*, Nos. 74-165 to 74-168, decided December 16, 1974, slip op. 47.

scribed in paragraphs (7) and (8) of section 216 of the Act * * *." Thus, the section of Chapter X that confers voting rights on creditors and/or stockholders makes clear that voting rights may effectively be withdrawn if a creditor or shareholder is afforded adequate protection for his financial interest in the debtor under the cram-down provisions of Sections 216(7) and (8). Section 179 thus shows that the cram-down provisions of Sections 216(7) and (8) can be used to surmount the objections of dissenting creditors and shareholders.[6] See 6 Collier, *Bankruptcy* ¶ 7.35, pp. 1295-1296 (14th ed., 1972 rev.).

This conclusion is supported by *Country Life Apartments* v. *Buckley*, 145 F.2d 935 (C.A. 2), where confirmation of a plan was upheld even though neither of two affected classes of creditors accepted the plan. That case involved Section 216(7)(b), which provides that creditors are adequately protected by "* * * a sale of * * * [the debtor's] property free of * * *

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[6] Petitioner's contention (Pet. 5-7) that Section 236 of Chapter X, 11 U.S.C. 636, requires the judge either to dismiss the proceeding or to adjudicate the debtor a bankrupt where no plan is accepted would effectively nullify Sections 179 and 216(7) and (8). Section 236 is primarily concerned with the situation where a plan is either unnecessary, in which case dismissal should occur, or impossible due to the gravity of the debtor's financial situation, in which case liquidation under ordinary bankruptcy provisions can be directed. This Court has held that failure to accept a plan, standing alone, does not compel dismissal and that the district court may permit a reasonable time for a new proposal to be offered where it appears that a fair and equitable plan may be adopted. *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106, 131-132.

claims, at not less than a fair upset price * * *." The court rejected the argument that the creditors' assent was nonetheless required for confirmation of the plan (*id.* at 938):

> Appellants further urge that the plan should not have been confirmed, since it lacked the assent of a two-thirds majority of any class of creditors. * * * Under Bankruptcy Act, § 179, no acceptance need be obtained from a class of creditors or stockholders "for whom payment or protection has been provided as prescribed in" § 216(7, 8). See 3 Gerdes on Corporate Reorganizations, 1936, § 1113. The trustee's plan contained a provision for the sale of the property at not less than the $525,000 upset price, which, as we have seen, was the accepted fair value of the property, and for a transfer of the nonassenting creditors' claims to the proceeds. Since the nonassenting creditors were thus adequately protected under the trustee's plan, their assent did not constitute a necessary prerequisite to confirmation.

Compare *Texas Hotel Securities Corp.* v. *Waco Development Co.*, 87 F.2d 395, 400 (C.A. 5), certiorari denied *sub nom. Waco Development Co.* v. *Rupe*, 300 U.S. 679, where the court of appeals, in discussing what constituted adequate protection for dissenting creditors under the subsection of former Section 77B of the Bankruptcy Act (the predecessor of Chapter X) which was substantially identical to Section 216(7) of Chapter X, stated: "Payment of the face of the claim in cash is the perfect realiza-

tion of a money chose in action." Accord, *Gross* v. *Bush Terminal Co.*, 105 F.2d 930, 932 (C.A. 2).

These decisions demonstrate that if creditors are afforded adequate protection by the cram-down provisions, their consent is not necessary to the confirmation of a reorganization plan. This principle is equally applicable to shareholders.

Petitioner's reliance (Pet. 7) on *In re Granville & Winthrop Bldg. Corp.*, 87 F.2d 101 (C.A. 7), certiorari denied *sub nom. Keig* v. *Lloyd*, 301 U.S. 702, is misplaced. That case involved a cram-down provision that permitted the district court to employ "such method as will, under and consistent with the circumstances of the particular case equitably and fairly provide * * * protection" for dissenting creditors. The quotation from the court's opinion that suggests that this general provision does not permit confirmation over the objections of creditors must be read in light of the court's finding that the plan did not in fact provide adequate protection (87 F.2d at 103). The decision merely reflects the principle that cram-down provisions must provide "indubitable equivalence" to dissenting creditors. *E.g.*, *In re Murel Holding Corp.*, 75 F.2d 941, 942 (C.A. 2). The cash payment in this case, which gives the nonassenting shareholders substantially more than the value of their shares, manifestly satisfies the requirement.*

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* Petitioner has never, and does not now, challenge the finding that $1.60 per share provides adequate protection for the shareholders. No such challenge could be made in

Contrary to petitioner's contention (Pet. 7, 8), the cram-down provisions of Section 216(8) do not render superfluous the confirmation provisions of the Act concerning acceptances and voting eligibility. Rejection of the plan may result in dismissal of the Chapter X proceedings or liquidation in ordinary bankruptcy, if there are no sponsors with sufficient resources to afford adequate protection to dissenters. But where adequate protection is provided by the plan (and particularly where, as here, the protection is in the form of a cash payment in excess of the value of the shares), the efficacy of Chapter X proceedings would be seriously impaired if dissenters could nonetheless prevent the rehabilitation of the debtor. Petitioner offers no convincing reason why the principle should not apply where there is only one class of shareholders.

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light of the finding, also not challenged, that the fair value of the shares is at most $1.00. See Pet. App. A-38 to A-39.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

LAWRENCE E. NERHEIM,
General Counsel,
Securities and Exchange Commission.

APRIL 1975.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1112

JAMES H. PRICE, *Petitioner,*

v.

STACEY W. COTTON, Trustee, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the Court of Appeals for the Fifth Circuit affirming per curiam the judgment of the District Court is reported at 505 F.2d 732 (1974) and is set forth in the Appendix to the Petition at pp. A-2 and A-3. The opinion of the District Court, which in-

corporates the report of the bankruptcy judge and special master, is unreported; it is also set forth in the Appendix to the Petition beginning at p. A-3.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Petition presents but a single question for review by this Court. That question is: Does rejection of a Chapter X reorganization plan by the stockholders preclude a court from confirming the plan where it has been accepted by the creditors and where the plan has been found by the court to provide adequate protection for the stockholders of the value of their equity?

STATUTES INVOLVED

Petitioner questions the construction which the courts below placed upon §§ 179, 216, 221 and 236 of Chapter X of the Bankruptcy Act, 11 U.S.C. 579, 616, 621 and 636. The entire text of Chapter X is set forth in the Appendix to the Petition; the aforementioned sections are to be found at pp. A-59 and A-60, A-66 through A-68, A-69 and A-72 respectively.

STATEMENT OF THE CASE

This litigation is the latest event in a long contest over the control of Atlanta International Raceway, Inc., a company which owns and operates an automobile racetrack outside Atlanta, Georgia. As a result of continuing financial difficulties, Atlanta International Raceway, in January 1971, filed a petition for reorganization under Chapter X of the Bankruptcy Act. In

February 1973, the trustee transmitted to the court two proposed plans of reorganization. One was based upon a proposal submitted by petitioner; this was later dismissed by the court at petitioner's request. The second plan was based upon a proposal submitted by the group that ultimately prevailed in the reorganization. As amended, this proposal became the basis for the plan filed by the trustee. (Petition, pp A-12, A-13 [1])

Based upon the report of the bankruptcy judge sitting as special master, the district judge found the trustee's plan, as amended, to be fair, equitable and feasible. (A-14) He ordered the trustee to submit the plan to a vote by the creditors and also by the shareholders, since the debtor had been found solvent. (A-14)

The results of the vote showed that the creditors, who among them held a total of approximately $1.8 million in liabilities, favored the plan by a better than two-thirds majority of each class of creditor. (A-15) However, the shareholders, holding an equity of some $320,000, rejected the plan. (A-15) Accordingly on August 30, 1973, the district court entered an order which, *inter alia,* granted the proponents of the trustee's amended plan an opportunity to file proposals designed to assure adequate protection for the shareholders in accordance with the requirements of section 216(8) of the Bankruptcy Act.[2] (A-15, A-16) Thereupon the proponents

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[1] References in the text to the Appendix to the Petition are hereinafter cited by page number alone, as, e.g., A-12.

[2] Section 216(8) provides:

> Sec. 216. A plan of reorganization under this chapter—
> . . .
>
> (8) shall provide for any class of stockholders which is affected by the plan and does not accept the plan by the ma-

of the trustee's plan offered to pay $1.60 per share to any stockholder who did not wish to retain an equity in the reorganized company, with the further understanding that no stockholder would be required to sell his stock. (A-36)

The special master having found that the approximate value of the company's stock was $1.00 per share,[3] concluded that the $1.60 offer was "more than adequate protection under Section 216(8) of the Act." (A-39)

Petitioner and others objected to the special master's report on the single ground that § 216(8) did not apply to a corporation with only one class of shareholders. No objections were made or errors alleged with respect to any of the findings of fact made by the special master.

The district judge rejected the construction of § 216 (8) suggested by the petitioner, approved and adopted the report of the special master, and ordered the trustee's amended plan confirmed. (A-8, A-9) He specifically found that the plan complied with article X of Chapter X (§ 216 of the Act) and that it was fair, equitable and feasible. (A-5)

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jority of the stock required under this chapter, adequate protection for the realization by them of the value of their equity, if any, in the property of the debtor dealt with by the plan, either as provided in the plan or in the order confirming the plan, (a) by the sale of such property at not less than a fair upset price; or (b) by appraisal and payment in cash of the value of their stock; or (c) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection: *Provided, however*, That such protection shall not be required if the judge shall determine that the debtor is insolvent;

[3] The valuation of $1 per share was based upon an appraisal ordered by the court and upon the calculations of the Securities and Exchange Commission. (A-38)

Petitioner appealed to the Court of Appeals for the Fifth Circuit which affirmed the decision of the District Court per curiam.[4] (A-1)

ARGUMENT

In support of his request for certiorari, petitioner argues that the decisions of the courts below are erroneous. He asserts that the question presented to this Court for review is an important one of first impression in the administration of the Bankruptcy Act, meriting the attention of this Court. It is respondent's view that the decisions below are clearly correct and that the denial of certiorari in this case would leave no one, except possibly the petitioner, in any doubt as to whether a reorganization plan which has been accepted by the requisite number of creditors and which provides adequate protection for the stockholders can be confirmed without the majority approval of the stockholders.

Section 179 of the Act provides that in order for a proposed plan to be considered by the court for confirmation it must first have been accepted by two-thirds of each class of creditor. If the debtor is solvent, it must also be accepted by stockholders holding a

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[4] The affirmance was pursuant to the Fifth Circuit's Local Rule 21 which provides:

> When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) *that no error of law appears; and the court also determines that an opinion would have no precedential value,* the judgment or order may be affirmed or enforced without opinion. (Emphasis supplied.)

majority of the shares. However, § 179 excludes from those whose acceptance must be obtained several categories of creditors and stockholders, specifically: (1) those who are not affected by the plan; (2) those whose claims or stock are disqualified under the Act; or (3) those "for whom payment or protection has been provided as prescribed in paragraphs (7) and (8) of section 216 of this Act." [5]

Section 216 prescribes the provisions which must be included in any reorganization plan. Paragraph (8), which is directly involved in the present case, specifically deals with the situation in which a plan does not receive majority acceptance of the stockholders. It requires in those circumstances that the plan or the confirmation order provide "adequate protection for the realization by them of the value of their equity, . . ." The statute then goes on to specify the manner in which the requirement of "adequate protection" may be met, including "appraisal and payment in cash of the value of their stock."

Paragraph (7), which is not directly involved in the present case, deals with a situation in which a plan is not accepted by the requisite two-thirds majority of creditors. It prescribes in language parallel to that contained in paragraph (8) the manner in which nonassenting creditors are to be protected.[6]

In sum, Chapter X contains clear and well-defined exceptions to the general rule requiring acceptance of a reorganization plan by at least two-thirds of the creditors and, where the debtor is solvent, by stockholders

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[5] For text of § 179, see Petition, pp. A-59 and A-60.

[6] For text of § 216(7) and (8), see Petition, pp. A-66 and A-67.

holding a majority of the shares. One of those specific exceptions is for the case in which stockholders are to receive payment for the value of their stock. That is what was proposed in the present case and that is what was upheld by the courts below.

Petitioner contests this result, arguing that since there was no acceptance of the plan by the shareholders, the court was powerless to confirm it. Petitioner builds his statutory argument upon a unique application of § 236 of the Act. Section 236 appears in article XII—the article governing dismissals and adjudications. Section 236 provides for dismissing a Chapter X petition or adjudicating the debtor a bankrupt where the reorganization proceeding has collapsed at any one of a number of points including where "no plan approved by the judge is accepted."[7] Since no plan had been accepted by the stockholders in the present case, petitioner argues that the court below was in error in confirming the plan even though provisions had been made for adequate protection of the stockholders.

In his eagerness to find a statutory peg on which to hang this peculiar view of Chapter X procedures, petitioner apparently overlooks the preceding article. Article XI deals with confirmation and consummation of the plan. Section 221 of that article provides that "the judge shall confirm a plan if satisfied that

> (1). the provisions of article VII, section 199, and article X of this chapter have been complied with;
> . . . ."[8]

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[7] For text of § 236, see Petition, p. A-72.

[8] For text of § 221, see Petition, p. A-69.

Article VII sets forth the proceedings subsequent to approval of the petition by the court, including the prerequisites for holding a confirmation hearing, contained in § 179. Section 199 deals with claims of the United States and is not in issue here. Article X contains § 216(7) and (8) with their provisions for "adequate protection" of creditors and stockholders in lieu of majority acceptance of a plan.

Thus, the Act clearly contemplates and provides for confirmation—not dismissal or adjudication—even though a plan has not been accepted by the requisite number of shareholders or creditors—provided that the nonassenting creditors or shareholders have been given the "adequate protection" prescribed by the Act. In short, it is clear that one does not even reach the question of dismissal or adjudication dealt with in § 236 where a plan complies with the "adequate protection" provisions of § 216(7) and (8).

In his attempt to reconcile the provisions of § 216(8) with the argument that § 236 requires dismissal or adjudication in the absence of acceptance by the shareholders, petitioner implies that the provisions of § 216 (8) were intended to apply only where there is more than one class of stockholders and at least one class has accepted the plan. Petition, pp. 7-8. Under this interpretation, § 216(8) of the Act could not apply to a vast number of corporations which have only one class of stockholders.

Petitioner made this argument fully before the courts below. It was disposed of by the District Court as follows:

> The Court does not agree. Clearly, Debtor is a corporation which is entitled to relief under the

> provisions of Chapter X. This, in the Court's opinion, would include the provisions of § 216(8). The Court feels that if Congress had intended that the provisions of § 216(8) would not apply to corporations with only *one* class of shareholders, it would have so provided. Since there is no such provision, the Court is satisfied the framers of the Act intended that § 216(8) would apply to all corporations eligible for relief under Chapter X of the Act.

While petitioner's interpretation of § 216 denying its application to companies having only one class of shareholders may be helpful to him in justifying his peculiar construction of § 236, the result achieved underscores the fallacy of his position. Under petitioner's view of Chapter X, a plan may not be confirmed if the corporation has one class of stock and a majority of it reject the plan. But a plan may be confirmed if the corporation has two classes of stock and the shareholders of one class reject the plan, whereas those of the other class vote in favor of it. Clearly, neither the language of the statute nor any considerations of public policy can justify making such a distinction.

Petitioner goes beyond arguing from the language of the statute; he purports to find support for the result he seeks in the intentions of Congress as well. Thus he argues that it was the "clear intent [of Congress] to give stockholders the *right* to reject a plan of reorganization when they have an equity interest in the corporation." Petition, p. 7. And further he argues that it was not the intention of Congress to "force a plan on unwilling creditors and stockholders." *Ibid.* Yet nowhere in the Petition is there a single reference to a committee report, Congressional hearing, floor debate or other such source of legislative intent to support these contentions.

Indeed, the legislative history of the "adequate protection" provisions contained in § 216(7) and (8) is entirely to the contrary. It is clear from both Senate and House documents that these provisions were meant to be substantially the same as those found in paragraphs (b)(4) and (5) of old § 77B,[9] which until the enactment of the present Bankruptcy Act in 1938 governed corporate reorganizations. S. Rep. No. 1916, 75th Cong., 3d Sess. 34 (1938); Analysis of H.R. 12889 Prepared by National Bankruptcy Conference for the House Committee on the Judiciary, 74th Cong., 2d Sess. 70-72 (Comm. Print 1936). Paragraphs (4) and (5) of § 77B(b) were intended by Congress to permit confirmation of a plan in the face of its rejection by the shareholders provided the plan gave adequate protection for their interests. The report of the House Committee on the Judiciary on H.R. 5884, the bill which became § 77B, states:

> A plan shall not be confirmed until it has been accepted in writing by creditors holding two thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan and by stockholders holding a majority of the stock of each class. Such consent on the part of creditors is not required if their claims are not affected or if the plan makes provision for the payment of their claims in cash in full, or for their protection in the manner provided in subdivision (b) of clause (5). Reference will be made later to the protection required. Such acceptance is not required on the part of any stockholder or class of stockholders if the judge shall determine either that the debtor is insolvent or that the interests of such stockholder or stockholders will not be af-

[9] Act of June 7, 1934, ch. 424, 48 Stat. 912.

> fected by the plan or if provision is made for the protection of the interests of such stockholder or class of stockholders in the manner provided in subdivision (b) clause (4). Adequate provision is made in clauses (4) and (5) of subdivision (b) for the protection of such stockholders and creditors whose acceptances are not required. H. Rep. No. 194, 73d Cong., 1st Sess., 5-6 (1933).

See 3 *Gerdes on Corporate Reorganizations,* 1272-74 (1936).

Chapter X of the 1938 Act was enacted only four years after § 77B had become law and Congress was well aware that the new Chapter X would continue to authorize confirmation of a plan over majority objections. Thus, the report of the Senate Committee on the Judiciary accompanying H.R. 8046, the bill which became the present Bankruptcy Act, stated:

> Subsection (7) of section 216, derived from section 77B(b)(5), makes provision for the treatment of any class of creditors affected by a plan where two-thirds of such class fail to accept the plan. In such event a plan must provide adequate protection for the realization of the value of such creditors' claims, either by transfer or sale, or retention by the debtor, subject to such claims, of the property dealt with by the plan and affected by such claims, or by a sale of such property free of claims at not less than a fair upset price, or by the appraisal and payment in cash of the value of such claims, or, finally, by any method that will equitably and fairly provide adequate protection for the realization of such value.
>
> Subsection (8) of section 216, derived from section 77B(b)(4), is concerned with the protection of the interests of nonassenting classes of stockholders. The value of their equity, if any, is to be

> protected through a sale of the debtor's property at not less than a fair upset price, or by appraisal and payment in cash of the value of their stock, or by any other fair and equitable method. Insolvency of the debtor, however, makes any provision for stockholders unnecessary. S. Rep. No. 1916, 75th Cong., 3d Sess. 34 (1938).

Against this legislative history, it is difficult to see how it can be said that Congress intended that a plan could not be confirmed without majority acceptance by the shareholders. It is equally difficult to find any basis for petitioner's view that Congress intended § 216(8) to apply only where a corporation has only one class of shareholders.

Nevertheless petitioner insists that there is uncertainty which this Court should resolve because the precise question presented in this case has not been squarely ruled upon by the courts. As the Securities and Exchange Commission commented in this case before the Fifth Circuit, "this dearth of decisions results from the fact that it has been universally assumed that a challenge such as that made by appellant is wholly without merit." Brief for the SEC, p. 14.

Neither of the two leading bankruptcy treatises shares petitioner's doubts. *Collier* states:

> These . . . provisions set forth ways by which the rights of creditors or stockholders, or classes of them, may be disposed of *in invitum* so that their acceptances of the plan are unnecessary, providing, of course, that the plan is fair, equitable and feasible. In this connection, it should be pointed out that the Act, by affording methods other than acceptance which may be used to dispose of claims for the purposes of confirmation of a plan, thereby provides a means through which a dissenting

> *majority* of a class or classes of claimants may nevertheless be bound by a fair, equitable and feasible plan. 6 *Collier on Bankruptcy* (14th ed., 1973 rev.) 1295-96.

Similarly, *Remington* states:

> Section 216(7) and (8) make it mandatory for plans to make provision for the adequate protection of nonaccepting classes of creditors and stockholders who are affected by the plan. *Remington on Bankruptcy,* § 4596-97 (1961 rev.).

Although there appear to be no reported decisions, other than the present case, construing the provisions of § 216(8), petitioner states in his Petition that he has been able to find one case "involving a similar construction problem", *In re Granville & Winthrop Bldg. Corp.,* 87 F.2d 101 (7th Cir. 1936), *cert. denied sub nom., Keig* v. *Lloyd,* 301 U.S. 702 (1937). That case involved the predecessor provisions of § 216(7) in § 77B, relating to creditors. There the Court of Appeals reversed the order of the District Court confirming a reorganization plan on the ground that the protection afforded to the rights of nonassenting creditors was inadequate. *Id.* at 103. The case does not stand for the proposition, as petitioner implies, that the court has no authority to confirm a plan without its acceptance by the creditors even where the adequate protection requirements are met. The language quoted by the petitioner at p. 8 of the Petition deals rather with the much more limited question of the construction to be placed upon one of the several alternative provisions governing the *form* of protection to be afforded. The provision involved in *Granville* permits any form of protection which the court considers equitable. The protection afforded in the present case is appraisal and

cash payment. Accordingly it is inconceivable that *Granville* can be stretched to constitute an adverse precedent as to any aspect of the present case. Indeed *Granville* is one of a long line of cases applying the parallel language of the creditor provisions of § 216(7) and its predecessor provisions in § 77B which proceeds on the assumption that a plan may be confirmed even though it has not received the requisite two-thirds acceptance of the creditors. The issue in these cases is whether the protection afforded by the plan is adequate —a question which would not have arisen if we accept petitioner's theory that a plan may not be imposed upon nonassenting creditors and shareholders. See, e.g., *White* v. *Penelas Mining Co.*, 105 F.2d 726, 729 (9th Cir. 1939); *Texas Hotel Securities Corp.* v. *Waco Development Co.*, 87 F.2d 395, 400-01 (5th Cir. 1936), *cert. denied sub nom. Waco Development Co.* v. *Rupe*, 300 U.S. 679 (1937); *In re Murel Holding Corp.*, 75 F.2d 941, 942 (2d Cir. 1935).

Finally we would respectfully call to the attention of the Court the decision in *Country Life Apartments* v. *Buckley*, 145 F.2d 935 (2d Cir. 1944). In that case the Court of Appeals for the Second Circuit rejected appellants' argument that the reorganization plan should not have been confirmed because it lacked the assent of a two-thirds majority of any class of creditors, stating:

> Under Bankruptcy Act, § 179, no acceptance need be obtained from a class of creditors or stockholders 'for whom payment or protection has been provided as prescribed in' § 216 (7, 8). *Id.* at 938.

We respectfully submit that the plain meaning of words, the legislative history of the statutory provisions, the decisions of the courts and the complete ac-

cord of the leading bankruptcy treatises permit of no other decision than that reached by the courts below. Further there are no contrary decisions which would give rise either to a conflict among the circuits or to uncertainty as to the meaning of the law. This case simply does not present an important issue in the administration of the federal bankruptcy statute which merits review by this Court.

CONCLUSION

For the foregoing reasons we ask that the Petition for Certiorari be denied.

Respectfully submitted,

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